89-2010

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in requiring the County of Albemarle to engage in content-based censorship to exclude a private creche display from a public forum otherwise open on a first come, first served basis to all symbolic speech.

II. Whether the Court of Appeals erred in mandating the exclusion of a privately sponsored creche scene from a public forum when "less restrictive means" were available to accommodate the conflicting Free Speech and Establishment Clause interests.

PARTIES

In addition to the Petitioner and Respondent listed in the caption, the following persons are also Respondents in this action: Paula Kettlewell, Wayne B. Aranson, James J. Baker, Daniel S. Alexander, Douglas W. Kanney, James W. Pence, B. Eliot Singer, Jean M. Quigley and Cynthia K. Davis.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, the County of Albemarle, Virginia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is set forth at pages 1a to 19a of the Appendix to this Petition and is reported at 895 F.2d 953 (4th Cir. 1990). The district court opinion and order dated November 9, 1988, granting summary judgment is set forth in the Ap-

pendix at pages 20a to 69a and is reported at 669 F.Supp. 549 (W.D. Va. 1988). The district court opinion and order dated December 29, 1987, denying plaintiffs' motion for a preliminary injunction is set forth at pages 70a to 80a of the Appendix and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1990 (Appendix at 1a - 19a). The order of the court of appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on March 28, 1990 (Appendix at 81a - 83a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I

U.S. Constitution, Amendment XIV, Section I

County of Albemarle, Virginia, Policy on "Community Use of County Facilities"

The pertinent text of the foregoing constitutional provisions and the text of the foregoing County policy are set forth in the Appendix at pages 111a to 114a pursuant to Rule 14(f) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

This case presents a direct conflict between First Amendment rights granted by the Free Speech and Free Exercise Clauses, on the one hand, and prohibitions underlying the Establishment Clause, on the

other hand. The extreme lines drawn by the court of appeals in this case, in effect, force government to engage in impermissible content-based censorship of private speech in a public forum. It is respectfully submitted that this Court should grant a writ of certiorari in this case to fashion standards that will enable local governments adequately to accommodate and protect the rights granted by the first three Clauses of the First Amendment.

On December 6, 1987, the Charlottesville-Albemarle Jaycees, a private civic organization, erected a creche on the expansive lawn of the Albemarle County Office Building. The Jaycees' display was not sponsored, promoted or paid for by the County, nor was it owned, stored, or erected by the County or its employees. The land on which it was erected is situated at the corner of Preston Avenue and McIntire Road, a busy intersection in downtown Charlottesville, Virginia. The lawn is a park-like expanse of open space in front of the County office building and comprises approximately 2 acres (87,120 square feet) on a tract of public property containing 14.625 acres (Appendix at 103a - 106a). The creche, which occupied an area of approximately 500 square feet (Appendix at 92a) at the far Southwestern corner of the lawn, consisted of a wooden stable, together with three, seven foot tall "Wise Men" located outside the stable, two smaller angels attached to the stable, and the figures of Mary, Joseph and the Christ child inside the stable (Appendix at 92a, 100a - 101a). Upon its erection, a small disclaimer sign was placed in front of the scene which read: "Sponsored by Charlottesville Jaycees" (Appendix at 94a). A few days later, the initial sign was replaced with a larger sign, approximately five

feet by three feet, which read: "Creche Sponsored and Maintained By Charlottesville/Albemarle Jaycees, Not Albemarle County" (Appendix at 5a; 100a). Although the County had only used the office building (formerly a high school) for a period of 6 years, the lawn had been used for a variety of First Amendment activities, including symbolic speech.[1]

Prior to erecting the display, the Jaycees completed an "Application for Reservation of Albemarle County Parks and Recreation Buildings and Grounds" requesting use of the lawn from December 6, 1987 through January 10, 1988 (Appendix at 87a - 88a). The Jaycees also requested use of a nearby electrical outlet on the condition that they pay all utility charges in connection with the display. The County Executive of Albermarle County submitted the Jaycees' Application for consideration by the Albemarle County Board of Supervisors because of a previous controversy over the creche display in the neighboring City of Charlottesville (Appendix at 109a - 110a). The Board of Supervisors approved the Jaycees' Application at a regularly scheduled meeting on December 2, 1987, in accordance with Albemarle County's policy on "Community Use of County Facilities," adopted

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[1] Public access to the lawn was permitted by the overall policy on "Community Use of County Facilities" (Appendix at 111a - 114a). The lawn was used as a matter of *practice* by numerous groups for classic free speech and assembly activities, political, religious and symbolic, for periods ranging from "several hours to several weeks", including: First Virginia Night (a New Year's eve celebration), the Dogwood Festival (crowning of their queen), the State Volunteer Fireman's Picnic, several weddings and parades, the sale of drinks by nonprofit groups, performances by municipal bands, two Easter sunrise services, display of the United Way appeal placard, and a civil rights demonstration.

in 1982. The County's facilities use policy is found in the Appendix at pages 111a - 114a. The *only* action taken by the County was to approve the facilities use application subject to reimbursement for electrical charges and placement by the Jaycees of a disclaimer sign to eliminate any misunderstanding about County involvement.

On December 14, 1987, the Rev. William S. Smith and 9 other individual plaintiffs (collectively referred to herein as "Smith") filed suit against the County of Albermarle and the members of its Board of Supervisors (pursuant to 28 U.S.C. 1331, 1343(3), 1983, 2201-2202) requesting preliminary and permanent injunctions requiring the County to remove the creche from the lawn, a declaratory judgment declaring the County's actions to be violative of the Establishment Clause and an award of nominal damages. The Jaycees were not made a party to the action. The United States District Court for the Western District of Virginia, Michael, J., held a hearing on December 23, 1987, on Smith's motion to enjoin display of the creche and on December 27, 1987, issued an opinion denying the plaintiff's motion.

Following discovery by the parties, the filing of cross motions for summary judgment, the submission of written memoranda of law, and the argument by counsel, the District Court entered an order and memorandum opinion on November 9, 1988, granting Smith's motion for summary judgment and denying the County's cross motion. The Court issued a declaratory judgment ruling that the creche display violated the Establishment Clause. In an opinion accompanying the order, the District Court concluded that although the lawn was in the nature of a tra-

ditional public forum (Appendix at 48a - 49a; see also Appendix at 76a), the County must exclude the private speech in question because of what the Court deemed to be the "unseverable visual association between the trappings of County government and the religious symbols" leading to "the unmistakable message of [government] endorsement", thereby violating the Establishment Clause (Appendix at 45a).

On December 2, 1988, the County of Albemarle noted its appeal. Following briefing and argument, a three judge panel of the United States Court of Appeals for the Fourth Circuit issued an opinion on February 8, 1990, by Murnaghan, Circuit Judge (Appendix at 1a), affirming the District Court, with Chief Judge Blatt of the United States District Court for the District of South Carolina, sitting by designation, in dissent (Appendix at 15a). On March 28, 1990, the panel voted 2-1 to deny rehearing of the case and, upon suggestion for rehearing en banc, the full Fourth Circuit Court of Appeals voted 5-3, with two judges recusing themselves, to deny rehearing in banc (Appendix at 81a).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Misplaced Reliance upon this Court's decision in *Allegheny County*.

The court of appeals would require the County to exclude the Jaycees' creche from the lawn of its office building because of its religious nature and the "patent aura of government endorsement" which it saw in the display. It is respectfully submitted that this judicially-mandated, content-based exclusion "unnecessarily trammel[s] the right of free speech"[2] in a

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[2] The quoted words are from the dissent of Chief Judge Blatt, Appendix at 19a.

public forum and strikes an inequitable balance in reconciling precious, but nonetheless in this case, competing civil liberties protected by the First Amendment's Free Speech, Free Exercise and Establishment Clauses.

In its largely conclusory opinion, the court of appeals misplaced emphasis on this Court's decision in *County of Allegheny* v. *ACLU*, ___ U.S. ___, 109 S.Ct. 3086 (1989) ("*Allegheny*"). Instead of conducting a careful analysis of the facts of the case, the court of appeals majority made but a few broad brush comparisons between this case and the *Allegheny* case and summarily proceeded to condemn the display primarily because it was deemed to be a "prominent" religious display in a government setting (Appendix at 10a).[3] The court of appeals' failure to engage in a careful analysis of the facts inexorably led it to ignore the obvious factual distinctions between *Allegheny* and this case. *Allegheny* involved a creche display in a *non-public* forum not open for Free Speech. The very

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[3] The factors the court of appeals considered dispositive were: (1) the creche was not associated with any secular symbols; (2) it was situated on "a prominent part, not only of the town, but of the county office structure itself"; and (3) it was situated in the line of sight of the prominent sign identifying the building as a government structure (Appendix at 10a). The impact of the explicit disclaimer sign in front of the display was deemed to be mitigated by its size, and the Court went on to caution: "it remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion" (Appendix at 11a). The compelling Free Speech concerns of the County in providing equal access for all citizens to public facilities were minimized and deemed overridden by a judicially declared "compelling state interest" in preventing an Establishment of Religion.

presence of a creche in a *non-public* forum arguably raises a presumption of favoritism in the mind of a reasonable observer. Moreover, in the *Allegheny* case, the County was *actively* involved in erecting, storing, funding, promoting, enhancing and sponsoring the creche display. And the purported disclaimer sign, "Sponsored by the Holy Name Society", was no disclaimer at all. It merely amplified County endorsement and promotion of the creche display.[4]

In contrast, there was *no* affirmative governmental participation of any kind in the present case. The County simply permitted the use of a public forum on a first come, first served basis pursuant to a preexisting, general, non-discriminatory facilities use policy (Appendix at 107a - 110a; 111a - 114a). There was a sufficiently large sign that specifically disclaimed County sponsorship of the display. And, unlike *Allegheny*, the location of the private display was in an open public forum that had been used on numerous occasions in the past for social, commercial, religious, artistic and political expression and other privately sponsored events.

It is this latter public forum distinction, especially, that the court of appeals failed to accord sufficient analysis and emphasis. In *Allegheny*, the plurality *recognized* explicitly that a privately sponsored creche display in a public forum might present a different analysis or outcome:

> The Grand Staircase does not appear to be the kind of location in which all were free to place

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[4] *Allegheny*, 109 S.Ct at 3105. The relevant facts surrounding the menorah in the *Allegheny* case are discussed separately at pp. 12-13 *infra*.

> their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche. . . . In this respect, the creche here does not raise the kind of "public forum" issues, cf. *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L. Ed. 440 (1981), presented by the creche in *McCreary* v. *Stone*, 739 F.2d 716 (CA2 1984), aff'd by an equally divided Court, *sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83, 105 S. Ct. 1859, 85 L. Ed. 2d 63 (1985) (private creche in public park).

Allegheny, 109 S. Ct. at 3104, n. 50. *See also id.* at n. 38. The case at bar presents the public forum issue in its pristine form. The writ of certiorari should therefore be granted to resolve this important issue, both for the benefit of the parties, as well as for the benefit of the countless municipalities that face this vexing issue each year.

II. The Fourth Circuit decision conflicts directly with decisions in the D. C., Second, Third and Sixth Circuits underscoring a substantial conflict in the circuits that this Court should resolve.

As Chief Judge Blatt pointed out in dissent, the court of appeals majority seriously undervalued the Free Speech and Free Exercise Clauses. In doing so, it overlooked several conflicting decisions from other circuits. These decisions, taken as a whole, recognize long-established Free Speech/public forum principles that conflict with the reasoning of the court of appeals in the case at bar. The conflict among the circuits on the question of the display of religious symbols in public forums is substantially evident in decisions of

the District of Columbia, Second, Third, Fourth and Sixth Federal Appellate Circuits.[5]

District of Columbia Circuit. In *Allen* v. *Morton*, 495 F.2d 65 (D. C. Cir. 1973), the District of Columbia Circuit indicated that a private creche display free of government funding or sponsorship would be permitted in connection with the Pageant of Peace on the Ellipse of the National Mall. The erection of the display in what was essentially a public forum was subject to placement of properly exhibited disclaimer signs. Although the three-judge panel was split, it was the prevailing opinion that disclaimer signs would remedy any Establishment Clause problem. In a subsequent decision, the D. C. Circuit upheld against an Establishment Clause challenge a Mass to be conducted by Pope John Paul II on the grounds of the National Mall, Washington Monument, Ellipse, Lincoln Memorial green and United States Capitol grounds. *O'Hair* v. *Andrus*, 613 F.2d 931 (D. C. Cir. 1979). This latter case, and its significance for the case at bar, is discussed below in more detail at pp. 18-20 *infra*.

Second Circuit. In *McCreary* v. *Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd by equally divided Court, sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), a private group sought to gain access to a small traffic circle in the center of the retail

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[5] The Seventh Circuit has decided two cases on facts substantially identical to those found in the *Allegheny* case and in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), respectively. *See American Jewish Congress* v. *City of Chicago*, 827 F2d 120 (7th Cir. 1987) and *Mather* v. *Village of Mundelein*, 864 F.2d 1291, *rehearing denied*, 869 F. 2d 356 (7th Cir. 1989). Neither case presented the public forum questions presented in this case.

business district of the Village of Scarsdale, New York, to display a creche. In the face of a challenge to the Village's refusal to permit the display, the Second Circuit ruled that the Establishment Clause did *not* bar a private group from the exercise of its Free Speech rights in a public forum. The Court also concluded that an appropriate disclaimer would help to alleviate any Establishment Clause concerns. The *McCreary* case was accorded *plenary* consideration by this Court and *affirmed*, following oral argument, by an equally divided vote. 471 U.S. 83 (1985). Accordingly the *McCreary* decision is deserving of far greater precedential weight than the court of appeals was willing to recognize.[6]

In a more recent decision, *Kaplan* v. *City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *pet. for cert.* denied, No. 89-1625, June 11, 1990, the Second Circuit ruled that a privately sponsored menorah must be excluded from a park adjacent to the Burlington City Hall. The *McCreary* case was distinguished on

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[6] The Fourth Circuit Court of Appeals suggested that the "aura" of endorsement was not present in the *McCreary* creche case because of its display in a "park." In fact, the "park" in *McCreary* was a small (3,257 square foot) traffic circle in the center of the retail business district of Scarsdale, New York. It was common knowledge that this traffic circle, so prominent in the Village center, was Village property. The six foot, privately sponsored Scarsdale creche contained a small disclaimer sign (10-3/4 inches by 14-1/2 inches). It was precisely the smallness of the sign that prompted the Second Circuit to remand the case for a determination as to the proper size, visibility and wording of the disclaimer sign. In the present case, the Jaycees seven foot creche on the much larger lawn acreage had a disclaimer sign of approximately five feet by three feet (Appendix at 100a; 103a - 106a).

grounds that the menorah was not displayed in just any park, but in *City Hall* Park, adjacent to "the official symbol of Burlington city government." *Id.* at 1029. Although the "seat of government" distinction between *McCreary* and *Kaplan* has superficial appeal, the conflicts in the factual underpinnings of both decisions, as well as the significant First Amendment Free Speech interests involved, suggests the need for a more definitive resolution of the public forum issue raised by both cases.

Third Circuit. Renewed litigation in the wake of the *Allegheny* case in the Third Circuit, *Chabad* v. *City of Pittsburgh*, 89-2432 (W. D. Pa., Dec. 20, 1989)); No. 89-3793 (3rd Cir., Dec. 26, 1989); No. A-476 ___ U.S. ___ , 110 S. Ct. 708 (1989), centers on the public forum question. After the *Allegheny* decision, the City of Pittsburgh refused to permit Chabad (an orthodox Jewish group) to erect its previously displayed menorah outside City Hall. Chabad sought an injunction requiring that the City permit it to erect the menorah. One basis for the injunction was that the "site of the display was a 'public forum' to which the City could not constitutionally deny access for peaceful and constitutional forms of religious expression such as the menorah."[7] In the words of the Motion filed by Chabad with Justice Brennan acting as Circuit Justice:

> [Judge Barron P. McCune] issued an oral opinion in which he ruled only on the third of the plaintiff's three claims—*i.e.*, the "public forum"

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[7] Motion to Vacate "Temporary Stay" of Preliminary Injunction filed December 22, 1989, in *Chabad* v. *City of Pittsburgh*, No. A-476, United States Supreme Court, at 2.

> argument. He said that "the plaintiffs established that the last step of the step[s] of the City Building is a public forum." He noted that "it's [sic] been used as a public forum for this very Menorah since 1981" and that "the testimony showed in this case, it's [sic] been used for public demonstrations."

Id. at 4. After the injunction was issued mandating the City to permit the erection and display of the menorah on the steps of City Hall, Circuit Judge Weis stayed the injunction. A three-judge panel of the Third Circuit denied reconsideration of Judge Weis' stay. Upon application, Justice Brennan issued an order on December 22, 1989, vacating Judge Weis' stay and reinstating the District Court's injunction pending disposition of the case. A subsequent motion by the City of Pittsburgh requesting vacation of Justice Brennan's order was denied by the full U.S. Supreme Court on December 28, 1989, with three Justices dissenting. *Chabad* v. *City of Pittsburgh*, ___ U.S. ___, 110 S. Ct. 708 (1989).

The significance of the proceedings in the Third Circuit is that the public forum question remains a highly contested and important constitutional question, as this Court expressly reserved in the *Allegheny* case. Admittedly, the menorah in the *Allegheny* context was deemed not to be an entirely religious symbol. However, the *Kaplan* case demonstrates that in another context it may be viewed as a religious symbol. And the *Chabad* proceeding demonstrates the existence of grave questions as to the power of municipalities to engage in content-based discrimination in a public forum.

Sixth Circuit. In *ACLU of Kentucky* v. *Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), the Sixth Circuit upheld the funding, erection and prominent display of a "biblical-age" stable by the Commonwealth of Kentucky on the grounds of its State Capitol. The stable, which was owned by the Commonwealth, was a forum used for live nativity scene displays and the singing of Christmas carols by choral groups. After a constitutional challenge in the *Wilkinson* case, the Commonwealth acceded to an order issued by the District Court permitting the stable to remain provided the following corrective actions were taken: (1) all expenditures of public funds past and present for the stable must be defrayed from private funds, (2) a prominent disclaimer sign must be placed at the site, and (3) the stable and the surrounding area must be considered to be a public forum, open to use by all who apply. Under these circumstances and based on the context of the display among seasonal decorations, the Sixth Circuit found that the stable and the uses to which it was to be put would not violate the Establishment Clause.[8]

Although the factual setting of the *Wilkinson* case is more akin to that found in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984) (in that the Commonwealth of Kentucky actually owned and sponsored the display), it is difficult to reconcile the decision with the court of appeals' opinion in this case, both in its analysis of

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[8] In the 1986 case, *ACLU* v. *City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), the Sixth Circuit held that a City-owned, City-funded, City-erected creche on the lawn of the City Hall in Birmingham, Michigan, violated the Establishment Clause. This case did not present the public forum issue found in the case at bar.

the public forum issues and its reliance on a disclaimer to mitigate any Establishment Clause concerns.

III. There is a need for a well-defined standard of analysis in the "head-to-head" clash of Free Speech, Free Exercise and Establishment Clause values.

This case presents an obvious conflict among the Free Speech, Free Exercise and Establishment Clauses of the First Amendment. It arises, however, in a somewhat different legal posture than the three creche cases—*Lynch*, *Allegheny*, and *McCreary*—this Court has previously considered. In *Lynch*, there was no public forum issue; in *Allegheny*, the public forum issue was reserved; and in *McCreary*, the Village had *denied* the private sponsors of the display access to a public forum. Here, the County has *granted* access pursuant to an express open forum policy. In this legal posture, one group of private citizens is complaining that the grant of access to a second group of private citizens to erect a creche display violates their Establishment Clause rights. They seek to require the County to censor this second group of citizens based on the content of their speech. And parties *amici curiae*[9] have joined in th litigation below to assert their own individual Free Speech and Free Exercise rights and to protest threatened discrimination based on the content of their speech. This case, unlike most others this Court has heard or reviewed, presents in clear terms what Judge Blatt called a "head-to-head clash of these two competing First Amendment rights." 895 F.2d at 961 (Blatt, J., dissenting).

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[9] The names of the parties *amici curiae*, Northside Baptist Chruch et al. are listed in the style of the case in the court of appeals. See Appendix at 1a.

The court of appeals analysis of these competing claims is curiously muddled. Recognizing that the lawn is at least a designated, if not a traditional, public forum, it employs the familiar test that "government can enforce a content-based speech regulation in a public forum only when the regulation serves a compelling state interest and is narrowly drawn to achieve that end." 895 F.2d at 959. Borrowing from language of this Court in the case of *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981), it proceeds to discern in this case a "compelling state interest" for government not to violate the Establishment Clause. But in the *Widmar* case, the University of Missouri at Kansas City had actually adopted a specific policy closing University facilities to religious groups to advance what it believed to be its compelling Establishment Clause obligations. No such policy is being advanced by government in this case.[10] The analytical framework of the court of appeals is thus flawed, at least semantically, in its invocation of a "compelling state interest" against the Establishment of Religion. The Constitution (i.e. the Establishment Clause) may, in fact, compel courts to require a government to take certain action, but this compulsion may not necessarily equate with a government's advancement of a "compelling state interest" not to violate the Establishment Clause.[11] In the case at bar, there is no

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[10] "Compelling state interests" arise in the context of governmental policy objectives underlying legislative and executive actions. They have no independent life of their own in constitutional adjudication apart from judicial recognition of their specific advancement in support of legislative and executive branch action.

[11] *Widmar* is a case in point. Although the University's policy

legislative or executive branch action requiring "justification" in terms of a compelling state interest not to violate the Establishment Clause. Rather, instead of necessitating an assessment of the constitutional validity of restrictive government action based on such a compelling state interest, as in *Widmar*, this case presents a more direct conflict of constitutionally asserted values: (1) a claim by the respondents that government has violated their Establishment Clause rights; (2) a claim by the County that it should not be required to engage in impermissible content-based discrimination in the implementation of its policy of granting equal access to a public forum; and (3) argument by parties *amici curiae* that their individual Free Speech and Free Exercise rights are imminently threatened by the content-based exclusion of expressive activity that the respondents request the federal courts to impose.

The court of appeals' analysis of the "compelling state interest" in this case, as well as its application of Free Speech and Establishment Clause standards, is, thus, in one sense, inverted and confused. The conventional constitutional pigeonholes simply do not fit the situation where government is advancing a content-neutral equal access policy, and one group of citizens is objecting on Establishment Clause grounds, and another group is objecting to their threatened exclusion from a public forum. Chief Judge Blatt recognized this analytical difficulty in dissent:

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seeking to comply with the Establishment Clause was recognized to advance a "compelling state interest," it was also found not to be sufficiently compelling to override the University's concurrent equal access policy grounded in the Free Speech Clause, which forbids content-based exclusion of speakers.

> The analysis employed by the district court, and approved by the majority, uses the "endorsement" test of *Allegheny County* and applies it to the Free Speech "compelling interest" test. While there is a certain logic to these two First Amendment tests, I do not feel the merger of these standards comports with the spirit and intent of the protection of free speech.

Appendix at 16a (Blatt, J., dissenting). Perhaps in greater measure than in previous cases, "the resolution of this issue calls for a delicate balancing of individuals' rights to religious expression with the proscription against the government's establishment of religion." *Kaplan* v. *City of Burlington*, 891 F.2d at 1031 (Meskill, J., dissenting).

The draconian position of the court of appeals prohibiting the display of a private creche in a public forum is grounded in the unsubstantiated fear that citizens will mistakenly conclude that government endorses everything it does not censor.[12] This position not only discredits the intelligence of the reasonable observer, it is also incompatible with important Free Speech principles and the pluralistic nature of our society.

These elements were discussed eloquently by Judge Harold Leventhal in a significant D. C. Circuit case involving a direct conflict between Free Speech and Establishment Clause interests. In *O'Hair* v. *Andrus*,

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[12] *Westside Community Board of Education* v. *Mergens*, ___ U.S. No. 88-1597, June 4, 1990, Slip Opinion at 20 (O'Connor, J.); *see also* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. L. Rev. 1, 15 (1986).

613 F.2d 931 (D. C. Cir. 1979), renowned atheist Madalyn Murray O'Hair sought to enjoin the conduct of an outdoor Mass by Pope John Paul II to be situated at the apex of the National government, i.e., at the Washington Monument, the Ellipse, the National Mall, the Lincoln Memorial green and the United States Capitol grounds. Judge Leventhal, writing for the D. C. Circuit, refused to enjoin the Mass, stating:

> A central aspect of our pluralist society is its religious diversity. This pluralism reflects the very purpose of the Establishment Clause. And this pluralism is nurtured by the precept of equal access to a public facility generally open to the public.

Id. at 934-935. In the *O'Hair* case, Mrs. O'Hair specifically raised the spectre of government endorsement of the Catholic faith posed by the performance of the Mass at such a "prominent" governmental location:

> Appellants say that the government permit for this occurrence *on the renowned National Mall* sends an implied message—to the nation and to the world—of government approval (and, therefore, "establishment") of this church service. It implies no more approval for this church than for any other group using the Mall. The message it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.

Id. at 936 (emphasis added). If the backdrop of the most identifiable symbols of American government—the Washington Monument, the United States Capitol and the Lincoln Memorial on the National Mall—does

not convey the message of endorsement of a Mass attended by tens, if not hundreds of thousands of people, it is difficult to argue in the case at bar that the creche in its context does convey a message of endorsement, particularly in the light of the specific disclaimer of endorsement made at the site of the display.

"[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Westside Community Board of Education* v. *Mergens*, *supra*, Slip Opinion at 20 (O'Connor, J.). The equal right to advocate one's views in the public square, whether religious or otherwise, is a fundamental, affirmative freedom. While certainly any credible implication of government endorsement of religious speech should be explicitly disclaimed, forcing government to deny citizens equal access to the public arena and disqualifying them in the equal exercise of their Free Speech and Free Exercise rights, solely on the basis of the content of their intended speech, is severely intrusive on important rights explicitly granted all citizens by the Constitution. Such a disqualification is not unlike a "religious test" for the exercise of basic constitutional privileges, a practice long condemned in our history. *See* U.S. Const., Article VI. For these reasons, the exclusion of speakers from a public forum based on the content of their speech should serve only as a remedy of last resort. As Mr. Justice Brandeis said years ago, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not

enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The court of appeals would force the County to sever the private religious display from the public square, in effect, declaring the banned speakers to be "outsiders" and "less than full members of the political community," not unlike the complaint of persons offended by the alleged endorsement in question. *Cf. Allegheny*, 109 S.Ct. at 3118. The severance of private symbolic religious speech from public property unquestionably demeans it and, purely and simply, renders it second class speech. Unlike others who may, for example, seek to oppose apartheid with symbolic tent cities,[13] or indeed, to burn the American Flag as a symbol of protest,[14] the County is required by the court of appeals ruling not only to deny access to one group of speakers seeking to compete in the public marketplace of ideas, but, in effect, to impose against that group of citizens a badge of inferiority based solely on the content of their message. The court of appeals in the case at bar was, therefore, imprudently extreme in its requirement that the County ban the private holiday display outright from the public square.

In his dissent in the case at bar, Judge Blatt stated he would recognize the factually based nature of the inquiry and "incorporate the public forum factor into the calculus of the 'Establishment' equation." Appendix at 16a (Blatt, J., dissenting). Consonant with this Court's recognition in *Allegheny* that "the effect of

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[13] *Students Against Apartheid Coalition* v. *O'Neill*, 660 F. Supp. 333 (W.D. Va. 1987).

[14] *Texas* v. *Johnson*, ___ U.S. ___, 109 S. Ct. 2533 (1989).

a creche display turns on its setting," 109 S. Ct. at 3101, Judge Blatt would consider any endorsement arising from the "governmental trappings" of the forum to be mitigated by the very fact of the creche's display in the public forum "setting". This same approach was advocated by Judge Meskill in the *Kaplan* case: "the fact that the display is in a public forum in which a wide variety of other kinds of speech and expression takes place is a factor negating governmental endorsement of the religious message of the display." *Kaplan* v. *City of Burlington*, 891 F.2d at 1033 (Meskill, J., dissenting).

And if the public forum element is not enough in any given context to remedy the alleged Establishment Clause concern, both Judge Blatt and Judge Meskill suggest a "less-restrictive-means" short of exclusion to negate any perception of endorsement. In their view, a sufficiently visible disclaimer sign would preserve for all citizens the exercise of their First Amendment Free Speech rights and yet protect against any suggestion of government endorsement, those whose rights of conscience might be pricked by the display in a public forum setting.

It is apparent that the novel issues presented by this case do not fit the normal "pigeonholes" of constitutional analysis. This Court should, therefore, grant the writ of certiorari to determine what constitutional standards properly apply in this head-on conflict of constitutional values.

IV. In its exclusion of the privately-sponsored display from a public forum, the court of appeals failed to employ the "least-restrictive-alternative" standard even though less restrictive means were readily available to satisfy Establishment Clause concerns.

A. The Least-Restrictive-Means Standard.

The court of appeals majority concluded that it was necessary to enforce an "outright exclusion" of the private creche from the public forum because the "aura" of endorsement was so pervasive that no "narrowly tailored" means short of exclusion would remedy the problem. The paucity of the court's analysis on this point, however, is exceeded only by its circular and opaque reasoning, to wit: "If a disclaiming sign is not sufficient to alter the message of endorsement, it is paradoxical to conclude that requiring such a disclaimer serves as a more narrowly tailored regulation." Appendix at 14a.

The majority opinion makes no mention of the applicable standards developed in an important series of recent decisions of this Court involving governmental restrictions on Free Speech. *See Boos* v. *Barry*, 485 U.S. 312 (1988).[15] In *Boos*, this Court struck down a provision of the D. C. Code that imposed an overtly content-based penalty on speech that was critical of

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[15] *Cf. Frisby* v. *Schultz*, ___ U.S. ___, 109 S. Ct. 2495 (1988) (time, place and manner regulation - restrictions must target and eliminate the exact source of the "evil"); *Ward* v. *Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989) (time, place and manner regulation only - *Frisby* standard); and *Board of Trustees, State University of New York* v. *Fox*, ___ U.S. ___, 109 S. Ct. 3028 (1989) (commercial speech - there must be a "fit" between the legislature's ends and the means chosen to accomplish those ends).

foreign governments within 500 feet of embassies. In doing so, it found that a "less restrictive alternative" was readily available. *Id.* at 329. The application of this standard was later discussed by the Court in *Ward* v. *Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746, 2758, n. 6 (1989):

> In *Boos*, we concluded that the government regulation at issue was "not narrowly tailored; a less restrictive alternative is readily available." . . . The regulation we invalidated in *Boos* was a content-based ban on displaying signs critical of foreign governments; such content-based restrictions on political speech "must be subjected to the most exacting scrutiny." While time, place or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context.

Because the case at bar similarly involves explicit *content* discrimination, any exclusion or restriction of the creche must be subjected to "exacting scrutiny" and yield to the "least restrictive means" standard found in the *Boos* case.

Despite the court of appeals' recognition of the inherent content-based nature of an exclusion of the creche, it nevertheless failed to conduct any analysis whatsoever of less restrictive alternatives. There was no examination of alternate remedies, such as considering the size, visibility or number of the disclaimer signs, or the time period for the display, or the size or placement of the display or any other restrictions. Despite the fact that there had been other continuing symbolic displays on the site,[16] the *only* alternative

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[16] See note 1, *supra*, and Appendix at 94a.

that the court of appeals majority apparently considered in this instance was the exclusion of the display outright. The clear absence of "narrow tailoring" in the majority opinion suggests the majority was using a less stringent standard of review than is required for the content-based exclusion of speech from a public forum.

B. Means less restrictive than total exclusion of the creche were available in the case at bar to protect both the Establishment Clause and Free Speech/ Free Exercise interests.

In this case, the second disclaimer sign was of sufficient clarity, size and visibility to dispel any suggestion of government endorsement. And even if the sign was not sufficient in some respect, the case should have been remanded to the District Court for proceedings to determine the size, visibility and message of an appropriate disclaimer. The less restrictive alternative of a disclaimer recognizes not only the Establishment Clause concerns in this case, but also the equally compelling Free Speech interests. Such a balance would be far less intrusive on Free Speech rights and would not otherwise offend nonadherents who themselves would have the right to advance their own views in the forum.

As previously mentioned, at least three circuit courts of appeal have recognized the value of the disclaimer sign in dispelling the perception of endorsement. *See Allen* v. *Morton*, *supra* (D.C. Circuit); *McCreary* v. *Stone*, *supra* (Second Circuit); and *ACLU of Kentucky* v. *Wilkinson*, *supra* (Sixth Circuit). A proper disclaimer message "will ensure that no reasonable person will draw an inference that the Village supports any church, faith, religion associated with

the display of a creche during the Christmas season . . . ." *McCreary* v. *Stone*, 739 F.2d at 728.

This Court, too, has previously approved the effectiveness of disclaimer signs in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), and in the *Allegheny* decision itself, where it was indicated that "[w]hile no sign can disclaim an overwhelming message of endorsement . . . an 'explanatory' plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Allegheny*, 109 S. Ct. at 3114-15. Finally, Justices Marshall and Brennan, concurring in *Westside Community Board of Education* v. *Mergens*, *supra*, Slip Opinion at 9, noted that "if the school sought to continue its general endorsement of those student clubs that did not engage in controversial speech, it could do so if it also *affirmatively disclaimed* any endorsement of the Christian Club."

The court of appeals majority appears to be satisfied with no less than complete expungement of private religious speech from the public square, or at least in front of any overtly governmental setting. This, despite the fact that there was no evidence in the record to suggest that a reasonable observer would conclude, with or without a reasonable disclaimer sign, that the County had endorsed the display. And certainly no reasonable observer who read the text of the disclaimer sign in this case could conclude that this display was endorsed or sponsored by government.[17] The sign was of sufficient clarity,

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[17] The *Allegheny* endorsement standard is based on the reasonable observer. *Allegheny*, 109 S. Ct. at 3104.

size and visibility to negate "any hint of governmental endorsement that a viewer might 'perceive.' " *Kaplan* v. *City of Burlington*, 891 F.2d at 1034 (Meskill, J., dissenting). And even if it were not, the case should have been remanded for proceedings to determine the proper size, visibility and message of an appropriate disclaimer. This "less restrictive alternative" would have recognized the proper balance between Establishment Clause concerns and Free Speech and Free Exercise interests.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted and that the issues raised therein be decided by this Court.

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(2)

89-2010

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2973

WILLIAM S. SMITH; PAULA KETTLEWELL; WAYNE B. ARANSON; JAMES J. BAKER; DANIEL S. ALEXANDER; DOUGLAS W. KANNEY; JAMES W. PENCE; B. ELIOT SINGER; JEAN M. QUIGLEY; CYNTHIA K. DAVIS

Plaintiffs-Appellees

and

JAMES F. MCDONALD

Plaintiff

versus

COUNTY OF ALBEMARLE, VIRGINIA

Defendant-Appellant

NORTHSIDE BAPTIST CHURCH; LIVING HOPE CHAPEL; MARANATHA CHRISTIAN FELLOWSHIP; PROVIDENCE FOUNDATION; REVEREND WILLIAM TEMPLETON; REVEREND RICHARD A. WHITTAKER; REVEREND GREG R. DAVIS; REVEREND RUSSELL STROUP; LOIS G. STROUP; REVEREND LEWIS D. TEMPLEMAN; REVEREND RALPH S. CARTER; REVEREND MARK A. BELILES; STEPHEN K. MCDOWELL; NORMAN T. BRINKMAN; GEORGIA C. BRINKMAN; BILL KINCAID; ANNE KINCAID; RONALD J. GILBERT; ANN S. GILBERT; THOMAS W. GILLIAM; DIANE GILLIAM; MICHAEL A. COFFEY; DEBRA B. COFFEY; RICHARD H. RUBENOFF; LYNN RUBENOFF; SHEILA RICHARDSON; REVEREND JOHN MANZANO; REVEREND CURTIS L. GIBSON; EILEEN D. GIBSON; SUSIE S. K. WALDRON; ELIZABETH PARROTT; MARK L. MARHOEFER

Amici Curiae

and

TIMOTHY LINDSTROM; JOSEPH HENLEY; EDWARD H. BAIN, JR.; PATRICIA COOKE; RICHARD BOWIE; PETER WAY

Defendants

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (CA-87-68).

Argued: September 13, 1989 Decided: February 8, 1990

Before MURNAGHAN and SPROUSE, Circuit Judges, and BLATT, Chief United States District Judge for the District of South Carolina, sitting by designation.

George R. St. John (ST. JOHN, BOWLING & LAWRENCE on brief) for Appellant. James Jeffrey Knicely (GRABER, KNICELY & COTORCEANU; Roy W. Ferguson, Jr., WHARTON, ALDHIZER & WEAVER; John W. Whitehead, THE RUTHERFORD INSTITUTE on brief) for Amici Curiae. Dexter Brock Green for Appellees.

MURNAGHAN, Circuit Judge:

Here we approach one of the most entangled areas with which courts must be concerned under the First Amendment to the United States Constitution. That document provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. Const. Amend. I. The clause requires us to make decisions as to the application of "establishment of religion," "free exercise [of religion]," and "the freedom of speech" as those terms apply to a situation involving the erection of a nativity scene on the front lawn of the Albemarle County Office Building in Charlottesville, Virginia.

The plaintiffs, six Christian or Unitarian ministers, a Jewish Rabbi, and three private individuals of various religious backgrounds, are residents of Albemarle County, Virginia. They sued the Board of Supervisors and the County of Albemarle under 42 U.S.C. § 1983 for declaratory and injunctive relief, alleging that the Board of Supervisors violated the plaintiffs' Establishment Clause rights by permitting the local chapter of the Jaycees to erect a creche on the front lawn of the County Office Building. Judge Michael, of the United States District Court for the Western District of Virginia, granted summary judgment for the plaintiffs and the County now appeals.

Initially we must address an assertion, first raised on appeal, that the plaintiffs lack standing.[1] While that contention might otherwise be regarded as coming too late, it presents a question of jurisdiction *vel non* and thus must be considered.

The County has advanced, by supplemental brief, a claim that the plaintiffs, who are taxpayers and residents of Albemarle County, absent actual *economic* injury, have no standing to bring an Establishment Clause claim against the County. Recent authority, however, contradicts such an assertion. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (Pawtucket residents have standing to challenge the city's inclusion of a creche in its annual display); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (parent has standing to chal-

[1] The motion for leave to file an amended complaint, addressing that aspect in more detail, while granted, does not alter the conclusion reached independently of the amended complaint.

lenge school prayer statute); *Allegheny County v. ACLU*, ___ U.S. ___, 109 S.Ct. 3086 (1989) (local residents and local chapter of ACLU have standing to challenge the propriety of Allegheny County's display of a creche and city of Pittsburgh's display of a Menorah). *See also* L. Tribe, *American Constitutional Law* § 3-16, at 118-19 (2d ed. 1988) ("Interests sufficient to raise questions under the establishment clause of the first amendment may be asserted not only by criminal defendants and by taxpayers, but by all who can show a *direct and concrete impact* upon themselves from the action questioned."). The standing of plaintiffs is, therefore, established and we turn, then, to the claim regarding the establishment of religion.

All pertinent facts have been stipulated by agreement of the parties. Immediately prior to December 2, 1987, the Charlottesville-Albemarle Jaycees asked the Albemarle County Board of Supervisors for permission to place a nativity scene on the front lawn of the Albemarle County Office Building. At their meeting of December 2, 1987, the Board of Supervisors, by a vote of four to two, allowed the display of the nativity scene. The front lawn of the County Office Building is a grassy expanse located at one of the busiest intersections in Charlottesville. The County Office Building itself is a large brick building with a designation as the "Albemarle County Office Building" prominently displayed on the front of the building clearly above and behind the location of the creche. The American and Virginia flags flank the front of the building and are also in the general line of vision when viewing the creche. The creche consisted of large figures, easily visible, and illuminated at night. The creche was erected on December 6, 1987, and remained until January 10, 1988. No other seasonal symbols accompanied the display. The creche had no secular content. The erection and maintenance of the creche involved no expenditure of County funds. Immediately after the creche had been erected, an 18 inch by 6 inch sign reading "Sponsored by Charlottesville Jaycees"

was placed next to the creche. After suit protesting establishment of religion was filed on December 14, 1987, a larger and more specific disclaimer sign was placed next to the creche.[2]

The site has been the location of the County Office Building only since 1981. However, since that time, the lawn has been used sporadically for occasional activities: a beauty pageant, a billboard for the United Way, two Easter "sunrise" services, several assorted weddings, municipal band concerts, and a civil rights demonstration.

Despite the fact that the building is the office building for Albemarle County, it is located in downtown Charlottesville. It is a highly visible location. Indeed, the president of the Jaycees testified that he sought to erect the creche in that location because of the site's visibility. He insisted, however, that the choice of that property was not motivated by the lawn's location in front of the County Office Building.

In deciding how the particulars of the situation fit with earlier legal tests for determining violations of the Establishment Clause, the district court took particular note of the following aspects of the display. First, the creche consisted of large figures, readily visible, and brightly lit at night. Second, the creche was displayed for a five-week period. Finally, and most significantly, the creche was displayed in the context of a government site. That is, one could not readily view the creche without also viewing the trappings and identifying marks of the state. This visual association was, in the district court's view, unmistakable and impossible to sever.

Subsequent to the district court disposition of the case, the Supreme Court, in *County of Allegheny v. ACLU*, ___ U.S. ___, 109 S.Ct. 3086 (1989), clarified the involved

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[2] The disclaimer added after suit was filed read "Sponsored and maintained by Charlottesville-Albemarle Jaycees not by Albemarle County."

and delicate Establishment Clause balancing act required when evaluating a religious display in a public context. The district court's present opinion could have been written with *Allegheny County* before it. Judge Michael employed the same analysis and evaluated the same factors endorsed by the Supreme Court in *Allegheny County* to reach a result fully comporting with the Supreme Court's recent pronouncement.

A brief review of *Allegheny County*'s rationale demonstrates the correctness of Judge Michael's reasoning. From the collection of opinions in *Allegheny County*, central adjudicative principles must be distilled. A majority of the Supreme Court found the display of a creche, in circumstances very similar to those at bar, unconstitutional, and the display of a Menorah, with significant associated secular aspects not present here, constitutional.

The Court continued to base its Establishment Clause calculus on the three "tests" of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—"a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Allegheny County*, 109 S.Ct. at 3100 (citing *Lemon*, 403 U.S. at 612-613). Focusing on the second *Lemon* prong, primary effect (the only portion of the district court's reasoning contested in both *Allegheny County* and the case at bar), the Court continued to emphasize that the Establishment Clause is violated when a given governmental practice has the appearance or effect of *endorsing* religion. In such circumstances, adopting the views expressed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (concurring), a finding of "endorsement" is predicated on a review of the nature and context of the contested object, "what viewers may fairly understand to be the purpose of the display." *Allegheny County*, 109 S. Ct. at 3102 (quoting *Lynch*, 465 U.S. at 692 (O'Connor,

J., concurring)). Thus, a "particular physical setting" is critical—"[e]very government practice must be judged in its unique circumstances to determine whether it [endorses] religion." *Lynch*, 465 U.S. at 694.

Reviewing the physical setting of the displays in *Lynch* and *Allegheny County*, the Court engaged in a fact specific analysis. The display of the creche in *Lynch* and the Menorah in *Allegheny County* were upheld; the display of the creche in *Allegheny County* was not. The circumstances surrounding the display at issue here are strikingly similar to those the Court found unconstitutional in *Allegheny County*.

Looking to *Lynch*, the Court analyzed:

> the Pawtucket creche, seen in the context of that city's holiday celebration as a whole. In addition to the creche, the city's display contained: a Santa Claus House with a live Santa distributing candy; reindeer pulling Santa's sleigh, a live 40-foot Christmas tree strung with lights; statues of carolers in old-fashioned dress; candy-striped poles, a "talking" wishing well, a large banner proclaiming "SEASONS GREETINGS"; a miniature "village" with several houses and a church; and various "cut-out" figures, including those of a clown, a dancing elephant, a robot, and a teddy bear. See 525 F. Supp. 1150, 1155 (RI 1981). The concurrence concluded that both because the creche is "a traditional symbol" of Christmas, a holiday with strong secular elements, and because the creche was "displayed along with purely secular symbols," the creche's setting "changes what viewers may fairly understand to be the purpose of the display" and "negates any message of endorsement" of "the Christian beliefs represented by the creche." 465 U.S., at 692.

Allegheny County, 109 S.Ct. at 3102-03.

The Court found the Menorah in *Allegheny County* was combined with sufficient secular symbolism to create "an overall holiday setting." *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). It was placed next to a much larger Christmas tree, which the Court found typified a "secular celebration of Christmas":

> The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than *vice versa*. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative tradition.

Allegheny County, 109 S.Ct. at 3113-314. Further, a sign placed next to the display announced a salute to liberty:

> While no sign can disclaim an overwhelming message of endorsement, see *Stone v. Graham*, 449 U.S. 39, 41 (1980), an "explanatory plaque" may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. See *Lynch*, 465 U.S., at 707 (Brennan, J., dissenting). Here, the mayor's sign serves to confirm what the context already reveals: that the display of the menorah is not an

endorsement of religious faith but simply a recognition of cultural diversity.

Given all these considerations, it is not "sufficiently likely" that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an "endorsement" or "disapproval . . . of their individual religious choices." *Grand Rapids*, 473 U.S., at 390. While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, *ibid.*, the constitutionality of its effect must also be judged according to the standard of a "reasonable observer." See *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in judgment); see also Tribe, at 1296 (challenged government practices should be judged "from the perspective of a 'reasonable non-adherent' "). When measured against this standard, the menorah need not be excluded from this particular display. The Christmas tree alone in the Pittsburgh location does not endorse Christian belief; and, on the facts before us, the addition of the menorah "cannot fairly be understood to" result in the simultaneous endorsement of Christian and Jewish faiths. *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring). On the contrary, for purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season.

Allegheny County, 109 S.Ct. at 3114-15.

In contrast the Court found the creche in *Allegheny County* to be indisputably religious. Situated in the main

hallway of the County Office Building, it consisted of a nativity scene, framed by a floral pattern, surrounded by a sign "Gloria in Excelsis Deo." No secular symbols or artifacts were associated with the display.[3] The Court found that the creche's setting, nature, and effect contributed unmistakably to a message of government endorsement of religion.[4]

Here, too, the creche was not associated with any secular symbols or artifacts. The creche was situated on the front lawn of the County Office Building—a prominent part, not only of the town, but of the county office structure itself. Prominent in the background is the sign identifying the building as a government office structure. As

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[3] Counsel for the defendants/appellants candidly admitted at oral argument the absence, in the Charlottesville creche, of any secular symbols.

[4] The creche in *Allegheny County*, like the one here, bears a sign disclosing its ownership by a private organization. The *Allegheny County* Court found that this did not alter the conclusion:

> The fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, *e.g.*, *Texas Monthly*, *supra* (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Allegheny County, 109 S.Ct. at 3105.

in *Allegheny County*, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." 109 S.Ct. at 3104. Absent any contrary indication, the unmistakable message conveyed is one of government endorsement of religion—impermissible under the Establishment Clause of the Constitution. The endorsement of the religious message proceeds as much from the religious display itself as from the identification of a religious sponsor.

Albemarle County attempts to distinguish the Charlottesville situation from *Allegheny County* on several grounds. The later disclaimer affixed near the figures is certainly more unequivocal than those in *Allegheny County*. The relatively small size of the disclaimer, however, in relation to the whole of the display, mitigates its value. It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion. In effect, such an aura defeats Albemarle County's attempt to argue for a remedial measure short of total removal of the creche.

The County has also argued that the front lawn of the County Office Building is a public forum, thus raising countervailing First Amendment-Free Speech concerns to any absolute Establishment Clause prohibition. Such an argument was specifically preserved in *Allegheny County*. 109 S.Ct. at 3104 n.50.

Essentially, Judge Michael found that whether the lawn is or is not a public forum[5] is not dispositive. The critical gauge of any such content-related speech restriction is whether the overall context and nature of the restricted display conveys the impermissible message of governmental endorsement of religion.

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[5] The front lawn though used for such events as weddings and concerts does not have the traditional indicia of a free speech forum associated with a public park.

The defendants' basic claim is that, as the lawn is a "public forum," any restriction on their symbolic speech based on its religious content would violate their First Amendment free speech rights. Considering that assertion, the district court found that the Supreme Court has identified three types of fora: the public forum, the non-public forum and the designated public forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 802 (1985). Evaluating the county property, the district court found that, while the courthouse lawn may not have a long history of use for speech activities, the type of setting—the lawn in front of a seat of government—is similar to other settings found to be a traditional public forum. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (Lafayette Park and the Mall); *United States v. Grace*, 461 U.S. 171 (1983) (Supreme Court grounds); *Cohen v. California*, 403 U.S. 15 (1971) (municipal courthouse); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (state capitol grounds). The district court further found that even if the lawn is not a traditional forum, it is at least a "designated public forum," since the County had promulgated rules for admitting displays to the lawn. *See Cornelius*, 473 U.S. at 800. It is clear that the government can enforce a content based speech regulation in a public forum *only* when the regulation serves a compelling state interest and is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461 (1980). *See Cornelius*, 473 U.S. at 800 ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.").

The district court decided that here the contravention to the principles of the Establishment Clause was so great as to supply such a compelling interest. The court examined Supreme Court precedent addressing the conflict between free speech and the Establishment Clause. It determined that, although the separation of church and state

mandated by the Establishment Clause is, in the abstract, a compelling state interest, a policy of equal access to a public forum does not necessarily offend the Establishment Clause unless it cannot meet the test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981). In *Widmar*, the Court found that equal access to an open forum, in that instance the use of state university buildings by a religious group, would not implicate any of the *Lemon* factors. Here, however, the situation is different. The district court found the primary effect prong of *Lemon* is contravened by a prominent religious display in a government setting. The associational message is more severe than a simple policy of access to vacant school rooms.[6] As the display unmistakably conveyed an "endorsement," it also unmistakably violated *Lemon*, therefore justifying some restriction on an otherwise available public forum.[7]

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[6] The district judge stated:

> In *Widmar*, the message of endorsement was absent but here it is present. What does or does not seem like endorsement will depend in large measure upon the expectations related to the context within which the speech takes place. With a setting like *Widmar*, such as a student activity center or other open fora in a college setting, there is a clear expectation that various groups will use the facilities. Here the display took place at the symbolic center of government. In *Widmar*, the Supreme Court found that no *imprimatur* of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and its relation to the symbolic center of government, the appearance of a government *imprimatur* upon a certain religious ideology is present.

Smith v. Lindstrom, 699 F. Supp. 549, 565 (W.D. Va. 1988).

[7] The district court also correctly distinguished *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), where the court validated a private creche display in a public park. In *McCreary*, the court construed *Lynch* as establishing a sweeping bright line rule that the display of creches does

Given a compelling state interest to remove any suggestion of governmental endorsement of religion, the district court found the most narrowly tailored means available to be outright exclusion. In this conclusion, too, logic, both factual and legal, supports the court's reasoning. If a disclaiming sign is not sufficient to alter the message of endorsement, it is paradoxical to conclude that requiring such a disclaimer serves as a more narrowly tailored regulation.

For related reasons, we do not, on the facts before us, encounter a prohibition of the free exercise of religion. Excluding the creche from government property is a justifiable, indeed a necessary, restriction but by no means a prohibition. *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 382 (1985) (solution to tension between free exercise clause and establishment clause is to guard individual right to worship while requiring government "maintain a course of neutrality among religions, and between religion and non-religion.").[8]

In sum, the reasoning and holding of the district court are sound, comport presciently with the Supreme Court's recent pronouncement in *Allegheny County*, and, therefore, are

AFFIRMED.

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not violate the Establishment Clause, a view that is patently incorrect in light of *Allegheny County*. Further, as the district court noted, the physical setting in *McCreary* did not convey the same aura of endorsement as that contained in both *Allegheny County* and here. Judge Michael's reasoning thus only extends the physical setting mode of analysis, espoused by Justice O'Connor in *Lynch*, 465 U.S. 668, 692, and adopted by the Court in *Allegheny County* for general Establishment Clause cases, to the area where the competing First Amendment rights of free speech and separation of church and state overlap.

[8] For a case involving many of the same problems and arriving at the same result, *see Kaplan v. Burlington, Vt.*, No. 89-7042 (2d Cir. Dec. 12, 1989) (1989 U.S. App. Lexis 19078).

BLATT, District Judge, dissenting:

The majority holds that a creche, displayed on what is admittedly a public forum, must be removed because its placement gives the appearance of governmental "endorsement" of religion. While I agree with much of the majority's legal interpretation of the *Allegheny County* opinion, I do not feel that the mandate of *Allegheny County* reaches the situation present here, and I, therefore, respectfully dissent.

The majority begins its analysis of the case by characterizing *Allegheny County* as "clarif[ying] the involved and delicate Establishment Clause balancing act required when evaluating a religious display in a public context." *Supra* at 7. I cannot agree with such a characterization; indeed in *Allegheny County*, the Supreme Court noted that the creche involved there, placed as it was inside the stairway of the courthouse, did not "raise the kind of 'public forum' issue" involved in cases such as *Widmar* and *McCreary*. 109 S.Ct. at 3104, n.50. While later in their opinion, the majority takes note of this distinction—at page 12—they then seem to ignore such distinction and accept *Allegheny County* as controlling in all respects.

While I do not take lightly the potential Establishment Clause problems this case presents, I feel that the location of the creche here involved on an admitted public forum is a factor that merits closer examination. The Free Speech Clause of the First Amendment has been the subject of numerous cases. As noted by the district court and the majority, the government can enforce regulation of "speech in a public forum only when such regulation is *narrowly* drawn to protect a "compelling state interest."[1] The anal-

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[1] The district court found the Albemarle County Courthouse lawn to be either a traditional public forum or a designated public forum. J.A. at 152. As noted by the district court, regardless of the characterization as a traditional public forum or a designated public forum, the test is the same. *See Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 780, 105 S.Ct. 3439, 34'8 (1985).

ysis employed by the district court, and approved by the majority, uses the "endorsement" test of *Allegheny County* and applies it to the Free Speech "compelling interest" test. While there is a certain logic to the usage of these two First Amendment tests, I do not feel that the merger of these standards comports with the spirit and intent of the protection of free speech.

It is undisputed that religious speech is protected speech. See *Widmar*, 454 U.S. at 269, and cases cited therein. In this case, the county government recognized that fact and, consistent with its pre-existing policy of allowing any group to utilize the lawn for a display, allowed the Jaycees to use the public forum. See J.A. 12-14. By ordering removal of the creche, the majority and the district court are forcing the county to advance the rights guaranteed by the Establishment Clause at the expense of the right of free speech. I feel that when these competing rights are involved, a strict application of *Allegheny County*'s endorsement test is inappropriate; the Supreme Court made it clear in footnote 50 of *Allegheny County* that it was not ruling on a situation in which these two fundamental rights conflicted.

In the absence of a mandate from the Supreme Court on the "head-to-head" clash of these two competing First Amendment rights, I feel that this court is faced with two alternatives. One option, *which I would adopt*, is to move away from a strict application of the "endorsement" test found in *Allegheny County*, and to incorporate the public forum factor into the calculus of the "Establishment" equation. This would involve even more of a "case-by-case" analysis, but the Court has made it clear that such a fact specific evaluation must be employed in a case such as this. 109 S.Ct. at 3103. Indeed, following the language of *Allegheny County*, "the effect of a creche display turns on its setting." *Id.* I submit that, while on the facts of *Allegheny County* the Court admittedly was referring to the secular trappings surrounding the religious displays, its

specific refusal to reach the public forum conflict suggests that all courts must also consider the location of the display. In the case at bar, the "setting" is a public forum, a "setting" traditionally afforded great protection by the Constitution and the courts. On the facts of this case, therefore, I feel that the public forum setting of an admittedly religious display must be given as much consideration as the secular trappings surrounding the menorah in *Allegheny County*.[2] Applying such an analysis, I submit that the Establishment Clause has not been violated. Viewing the creche and the disclaimer sign alongside,[3] at a location where other groups have been allowed to convene and/or erect displays, should cause neither the court nor the public to believe that Albemarle County was endorsing the Christian religion.

Should this modification of the "setting" test be incorrect, I still must respectfully dissent from the majority's conclusion and offer another alternative. Upon finding an Establishment Clause violation, the majority here then moved to the Free Speech Clause of the First Amendment. They found the violation of the Establishment Clause to be a "compelling state interest" and then held that the "least restrictive means" of protecting the state interest was total exclusion of the creche from the Charlottesville lawn. Having already voiced my disagreement with the finding of an Establishment Clause violation, I must agree that, if such a violation is present, surely it would qualify as a "compelling state interest." It is with the majority's

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[2] Additionally, the county erected a disclaimer sign next to the creche proclaiming that the creche was sponsored by a civic group and not by the county itself. The presence and content of the sign should also be factored into the court's study of the entire "setting." The disclaimer sign is discussed more fully on pages 20 through 22 of this opinion, *infra*.

[3] No reference has been found in the record of the exact size of the second disclaimer sign. It was, however, "larger" than 18" x 6". J.A. at 118-19.

holding that complete exclusion of the creche is the least restrictive means of accommodating such a state interest that I also disagree.

The majority gives short shrift to the issue of disclaimer signs and states, "[i]t remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion." *Supra* at 12 (emphasis in original). With that statement, the majority finds it inescapable that the ordinary viewer would find the display, with or without the disclaimer sign, to be an endorsement of religion and, therefore, impermissible. In making these findings, the majority quotes from, and presumably relies on, *Allegheny County*. In *Allegheny County*, however, the sign was not truly a "disclaimer" sign. It stated, "This Display Donated by the Holy Name Society." *Allegheny County*, 109 S.Ct. at 3094. The language of Allegheny County's sign "len[t] [the government's] support to the communication of a religious organization's religious message." *Allegheny County*, 109 S.Ct. at 3105. It was this "support" the Supreme Court found to be tantamount to endorsement.

The disclaimer sign posted on the Albemarle County lawn read, "Sponsored and Maintained by the Charlottesville-Albemarle Jaycees, Not by Albemarle County." The majority does note that the instant sign is more "unequivocal than those in *Allegheny County*." *Supra* at 12. It does not, however, elaborate on the major difference in the language of the disclaimers. Anyone who read the Albemarle sign knew that the county did not "endorse" the creche scene. Indeed, the Supreme Court noted in *Allegheny County* that, "[w]hile no sign can disclaim an overwhelming message of endorsement . . . an 'explanatory' plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Id.* at 3114-15 (citations omitted). If the wording on any "explanatory plaque" could convey to the reader

that a government did not sponsor a certain religion or religious belief, certainly the unequivocal language used by Albemarle County should suffice.

The majority notes that the relatively small size of the disclaimer sign "mitigates its value." *Supra* at 12. I agree that the size of any disclaimer sign is an important factor in determining the effectiveness of the government's disavowal of a "religious" message. The district court notes that the first sign was 18" x 6" and was replaced by a "larger" sign. J.A. at 118-19. No reference is made in the record as to the second sign's exact size, and there was some dispute about that issue at oral argument. Rather than total exclusion of the creche, I feel that a remand to the district court to direct the county to erect a sign of sufficient size to make it clearly apparent to every viewer that the creche was not endorsed by the county would be one method that would legally meet the "least restrictive means" test, and thus avoid allowing Establishment Clause rights to unnecessarily trammel the right of free speech.

While I agree that not every sign effectively disclaims governmental involvement in "religious" displays in every "setting," certainly the language in this disclaimer on a sign of appropriate size, under the facts of the "setting" in this particular case, will sufficiently convey a message of "nonendorsement" to anyone who reads it, and, thus, the delicate Establishment Clause "balancing act test" will be met.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 87-0068-C

REV. WILLIAM S. SMITH, *et al.*,

Plaintiffs

v.

TIMOTHY LINDSTROM, *et al.*,

Defendants

CLERK U.S. DIST. COURT
CHARLOTTESVILLE, VA
FILED

NOV 9 1988

Deputy Clerk
/s/ V. Harris

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

This case is before the court on cross motions for summary judgment by plaintiffs and defendants. The action arises under the establishment clause of the first amendment of the United States Constitution, as applied to the states through the fourteenth amendment. U.S. Const. amend. I; U.S. Const. amend. XIV; *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). For the reasons elaborated be-

low, this court grants plaintiffs' motion for summary judgment and finds that in permitting the erection of a nativity scene on the front lawn of the Albemarle County Office Building, defendants violated the Establishment Clause of the first amendment of the United States Constitution.

I.

Plaintiffs are a group of local citizens, some of whom are ordained clergy. Defendants are the Board of Supervisors of Albemarle County, Virginia.

All pertinent facts in this matter have been stipulated by agreement of both parties. Immediately prior to December 2, 1987, the Charlottesville-Albemarle Jaycees asked the Albermarle County Supervisors (defendants) for permission to place a nativity scene on the front lawn of the County Office Building. At their meeting of December 2, 1987, the defendants, by a vote of four to two, allowed the display of the nativity scene. The front lawn of the County Office Building is a grassy expanse located at one of the busiest intersections in Charlottesville. The County Office Building is a large brick building with "Albermarle County Office Building" prominently displayed on the front of the building clearly above and behind the location of the creche. The American and Virginia flags flank the front of the building and are also in the general line of vision when viewing the creche. The creche consists of large figures, easily visible, and illuminated at night. The creche was erected on December 6, 1987, and remained until January 10, 1988. No other seasonal symbols were present in the display. The erection and maintenance of the creche involved no expenditures of County funds. Immediately after the creche had been erected, an 18" by 6" disclaimer sign reading "Sponsored by Charlottesville Jaycees" was placed next to the creche. After this suit was filed on December 14, 1987, a larger disclaimer sign was placed next to the creche.

This site has been the location of the County Office Building only since 1981. However, since that time, the lawn has been used sporadically for occasional activities: a beauty pageant, a billboard for the United Way, two Easter "sunrise" services, several assorted weddings, municipal band concerts, and a civil rights demonstration.

Despite the fact that this is the office building for Albemarle County, it is located in downtown Charlottesville. It is a highly visible location. Indeed, the president of the Jaycees testified that he sought to erect the creche in that location because of the site's visibility, although he insisted that the choice of that property was not motivated by the fact that the lawn was situated in front of the County Office Building.

In deciding how the parameters of this situation fit with earlier legal tests for determining violations of the establishment clause, this court takes particular note of the following aspects of the display. First, the creche consists of large figures, readily visible, which are brightly lit at night. Second, the creche was displayed for a five-week period. Finally, and most significantly, the creche was displayed in the context of a government site. That is, one could not readily view the creche without also viewing the trappings and identifying marks of the state. Objectively, the visual association was unmistakable and impossible to sever.

II.

In determining whether a nativity display or creche violates the establishment clause, this court must follow the controlling law set out in the case of *Lynch v. Donnelly*. 465 U.S. 668 (1984). The City of Pawtucket, Rhode Island, erected a creche in a park in the downtown shopping district. *Id.* at 671. The display contained a variety of seasonal symbols, both thoroughly religious symbols and symbols which had lost their overt religious denotation.

The display was owned by the City and the park itself was owned by a non-profit organization. *Id.*

In the context of deciding this case, the Supreme Court made several observations which form the intellectual background for inquiries into violations of the Establishment Clause and for the application of any specific legal test. First, the Supreme Court recognized that there was a certain tension inevitably present in Establishment Clause cases: "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.* at 672. The Supreme Court went on to argue that not only is a literalistic application of the "wall of separation" metaphor impracticable and undesirable, but is one which does not find favor with the Supreme Court. *Id.* at 678. In no small part, the Court argued, the inadequacy of a "bright line" construct, like the inadequacy of the "wall" metaphor, rises out of the pluralism and complexity of contemporary American society. As the Court reasoned, "In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."[1] *Id.* In

[1] Many who would applaud any Supreme Court move away from the Jeffersonian metaphor of the "wall" between church and state argue that the proper posture is a consistent pattern of expansive (but supposedly) "nonpreferential" aid to religion. This court notes in passing that, at least in reference to the Establishment Clause questions involving displays and possible government endorsement, nonpreferential aid to religion is difficult, if not impossible. The assisted activities or ceremonies publicly celebrate a specific sect, cluster of sects, or a specific religious tradition, as opposed to other religious traditions or sects. Government assistance to religion which would involve the erection of displays celebrating a specific sect or group of sects may be nonpreferential in that any sect could make use of this platform, but it is

addition to noting the inevitable tensions at work in Establishment Clause cases and the need for a non-absolutist way of reading the Establishment Clause which exhibits deference to the pluralism of contemporary American society, the Court also noted the role that religion plays in American life. Indeed, Chief Justice Burger took great care to detail what he termed the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 674. This recognition of the role of religion in American life provided not merely the historical and intellectual backdrop of the Court's holding in *Lynch*, but was transformed by the Chief Justice from a descriptive datum into a pointed normative tool, a warrant for finding that the creche which was displayed in Pawtucket, Rhode Island did not violate the Establishment Clause of the first amendment.

The standard test for determining whether the Establishment Clause has been violated was developed in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lynch*, the Supreme Court also utilized the three-prong inquiry developed in *Lemon*.[2] Even as the Supreme Court was

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surely not nonpreferential in that it celebrates, or assists in the celebration of, a particular sect rather than in the celebration of some generic concept of "religion" without its particular sectarian manifestations.

> For the issues that are most controversial, nonpreferential aid is clearly impossible. No prayer is neutral among all faiths, even if one makes the mistake of excluding atheists and agnostics from consideration. . . . Government sponsored religious symbols or ceremonies, whether in schools, legislatures, courthouses, or parks, are inherently preferential.

Laycock *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 920 (1986).

[2] Under the *Lemon* test, a court inquires "whether the challenged law or conduct had a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an ex-

applying the three prongs of the *Lemon* test to the Pawtucket creche, it noted its continuing, if episodic, "unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679.

The Supreme Court first looked at the secular purpose prong of the *Lemon* inquiry. The Court found that

> The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The district court's inference, drawn from the religious nature of the creche, that the City had no secular purpose was, on this record, clearly erroneous.

Lynch, 465 U.S. at 681 (footnote omitted). The Court ruled that since some secular purposes were clearly at work in the display of the creche this initial prong of the *Lemon* test was satisfied. It need not be shown that the City had exclusively or solely secular purposes in displaying the creche. *Id.* at 681, n.6.

The second prong of the Lemon test examines the primary effect of the government action and asks whether the effect of that action is to benefit religion. In *Lynch*, the Supreme Court utilized what has been called a "more than" test. Van Alstyne, *Remarks at the Proceedings of the Forty-Fifth Judicial Conference of the D.C. Circuit*, 105 F.R.D. 251, 421 (1984). That is, the Supreme Court found that this creche was no more beneficial to religion than other programs or activities which had passed muster previously. "We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause." *Lynch*, 465 U.S. at 682. Furthermore, the Court found that whatever benefit would accrue

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cessive entanglement of government with religion." *Lynch*, 465 U.S. at 679 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

to a particular sect or religion or to religion in general from the display of this creche was sufficiently "indirect, remote, and incidental" to avoid violation of the second prong of the *Lemon* test. *Id.* at 683. The Chief Justice argued that the display in Pawtucket did not constitute any more of an endorsement of religion than governmental proclamations about the holiday of Christmas or the display of paintings with religious themes in museums supported by the government.[3] *Id.*

The final prong of the *Lemon* test is the inquiry into whether the action in question fosters " 'an excessive government entanglement with religion.' " *Lemon*, 403 U.S.

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[3] Van Alstyne's characterization of this prong of the inquiry as a "more than" test is accurate because in applying this prong of *Lemon*, the Chief Justice only ascertained whether the action in question went further than other state actions held to be permissible in the past. However, in utilizing Van Alstyne's characterization of the second prong of the *Lemon* test, this court is not to be understood as adopting the criticism of *Lynch* which Van Alstyne draws out of his characterization. Van Alstyne points to an alleged irony in the "more than" test when he argues that it functions not as the ceiling or limit on the interaction which government will have with religion but rather as a conduit leading to increased entanglement of church and state. Van Alstyne argues that

> The gradual (but increasingly pervasive) installment of compromised religion within government itself thus draws that which was formerly outside to the inside—the prevailing monotheism has been made a pervasive aspect of state practice, and put to service by the state when felt useful. Additional appropriations from sectarianism may then become logically fitted as part of this 'secular' state: distinctly religious practices, in so far as they serve the state, thus by definition have virtually succeeded in satisfying a secular purpose and as promoting a secular interest.

105 F.R.D. at 424. This court utilizes Van Alstyne's initial characterization as an illuminating one, but refrains from taking this opportunity to subscribe in the least to the criticism of *Lynch* which Van Alstyne advances. Without question, it is the structure of *Lynch* which must control the deliberations of this court in the matter before it.

at 613 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). The Supreme Court noted that the district court in Rhode Island had correctly found that "there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the creche." *Lynch*, 465 U.S. at 683. However, under this third prong of the *Lemon* test, the district court had found that the litigation in Rhode Island had resulted in "political divisiveness" and that this divisiveness coupled with the allegedly impermissible purpose and effect found by the district court resulted in "excessive entanglement." *Id.* at 683. While agreeing with the district court about the lack of administrative entanglement, the Supreme Court concluded that the First Circuit Court of Appeals had been correct in observing that political divisiveness alone was not sufficient in this case to strike down a state action which is otherwise constitutionally acceptable. *Id.* at 684. The Supreme Court seemed to restrict the inquiry regarding political divisiveness to those cases involving subsidies to schools, colleges, or other religious institutions. *Id.*

Therefore, the Supreme Court concluded, "We hold that, notwithstanding the religious significance of the creche, the City of Pawtucket has not violated the Establishment Clause of the first amendment." *Id.* at 687. In so holding, the Court noted that even though "the creche is identified with one religious faith," *id.* at 685, the display of the Pawtucket creche met objectives which essentially satisfied the *Lemon* test. One commentator has characterized those objectives in this way:

> [F]irst, the creche served the purpose of " 'respect[ing] the religious nature of our people' " by making public institutions receptive to religious expression. Second, when viewed in the context of the Christmas holiday celebration, the display—depicting the religious and cultural origins of the holiday—could be viewed as part of the

> nation's cultural heritage, and thus a worthy object of government recognition. Finally, the creche has the secular purpose of instilling 'friendly community spirit of good will in keeping with the season.'

Developments in the Law: Religion and the State, 100 Harv. L. Rev. 1606, 1656 (1987) (footnotes omitted).

In line with the Court's observation that the problems presented by these Establishment Clause cases cannot be handled in a "absolutist" manner, the majority emphasized the particularistic nature of the inquiry in a case such as this.

> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'

Lynch, 465 U.S. at 678 (quoting *Walz*, 397 U.S. at 668). While the Supreme Court has clearly developed a framework which this court is obligated to use in analyzing the matter before it, *Lynch* commands us to examine, in a particularistic manner, the effect of this creche in the context before us. Thus, the extent to which the nativity display in this action differs from or is similar to the display in *Lynch* will be of crucial importance in determining whether there has been an Establishment Clause violation.[4]

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[4] The display in question in *Lynch* contained "many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus House, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and the creche at issue here." *Lemon*, 465 U.S. at 671.

Perhaps what will prove to be one of the most far-reaching doctrinal developments to come out of *Lynch* is the conceptual structure which Justice O'Connor applied in her concurring opinion. As previously noted, the majority in *Lynch*, citing the earlier precedent of *Walz v. Tax Commission*, found that "The purpose of the Establishment Clause 'was to state an objective' not to write a statute.' " *Lynch*, 465 U.S. at 678 (quoting *Walz*, 397 U.S. at 668.) In attempting to elaborate on what this fundamental "objective" of the Establishment Clause might be, Justice O'Connor interprets it to mean that "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). According to O'Connor's reading of the objective of the Establishment Clause, inclusion for membership within the political community cannot be predicated on the presence or absence of religious affiliation or upon a particular type of religious affiliation.

Justice O'Connor notes that one way in which the Establishment Clause can be violated by government is when the state endorses religion. An endorsement of a religion by the state undercuts the Establishment Clause's purpose in prohibiting government from making membership in the political community a function of religious affiliation. Justice O'Connor goes on to note that "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 668. Of course, Justice O'Connor does not offer the notion of "endorsement" as an alternative to the *Lemon* test, but rather as a way of sharpening the focus of the inquiry which *Lemon* mandates.[5] When Justice O'Connor analyzed the

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[5] Justice O'Connor argues that "focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon*

Pawtucket creche, she concluded, as did the majority, that the display was constitutionally permissible. She found that when the creche was considered in the context of the display and in the context of the shared understanding of the Christmas holiday, "the display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion." *Id.* at 692 (O'Connor, J., concurring). Under her analysis, this was a government acknowledgment or recognition of religion and its place in American life, without the taint of government endorsement.[6]

There is no question but that in examining whether the display of a creche or nativity scene violates the Establishment Clause, the decision in *Lynch* is the controlling law for this court, as for every court in this country. However, since adjudication is not a mere mechanistic or formalistic process and since *Lynch* provides us only with the analytic framework within which to find an answer without giving us the exact answer, further analysis is necessary. In fact, the language of *Lynch* suggests such additional analysis. As noted *supra*, the majority clearly indicated that any judicial inquiry in this area must be a particularistic sort, not the mere reflexive application of

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test as an analytical device." *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring).

[6] Justice O'Connor argued that determination of whether or not there has been endorsement is properly a legal determination.

> [W]hether a governmental activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question of whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

Lynch, 465 U.S. at 693-94 (O'Connor, J., concurring).

a *per se* rule.[7] *Id.* at 678. In the spirit of the inquiry mandated by *Lynch*, this court is compelled to note that the facts of the case before it differ markedly from those in *Lynch*. In *Lynch*, the display incorporated virtually the universe of possible Christmas symbols, both robustly religious and markedly less so, and displayed them on a site owned by a non-profit group and used as a park. In the instant case, the display consists only of the religious nativity scene and it was located on public land at the very front of the County Office Building with the trappings of government providing the unavoidable and obvious backdrop to the display.

B.

Since *Lynch*, while undoubtedly legally controlling, is also factually dissimilar to the instant case, this court finds it useful to look at persuasive precedents from courts which have applied the holding of *Lynch* to other nativity displays.

In 1986, the Sixth Circuit Court of Appeals found that a city-owned creche displayed on the front lawn of the City Hall of Birmingham, Michigan, violated the Establishment Clause of the first amendment. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986). The display in question consisted solely of an unaccompanied nativity scene, including only the traditional religious creche figures. *Id.* at 1562. The creche in this case had been built and was maintained with public funds. *Id.* It was displayed prominently on the lawn in front of the

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[7] It is interesting to note in this connection that Justice O'Connor, in her concurring opinion, also calls for this sort of particularistic inquiry. "Every governmental practice must be judged in its unique circumstances to determine whether it constitutes a endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

Birmingham City Hall. The Sixth Circuit applied the *Lemon* test, as refined in *Lynch*, and found that the effect prong was violated. *Id.* at 1567. The court held,

> When surrounded by multitude of secular symbols of Christmas, a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings—accretions of the centuries—are stripped away, there remains only the universally recognized symbol for the central affirmation of a single religion—Christianity.
>
> . . . . It is difficult to believe that the city's practice of displaying an unadorned creche on the city hall would not convey to the non-Christian a message that the city endorses Christianity.

Id. at 1566. The Court of Appeals identified three salient aspects of this creche display which rendered it constitutionally infirm: the use of public funds in connection with the display, the location of the display in front of the City Hall, and the fact that it was the display of a nativity scene alone, unadorned with any secularized seasonal symbols. The first of these factors, the use of public funds, is the only characteristic not shared by the display in the case before this court and it is this characteristic which is arguably the least important to the result in the Birmingham case. While the Sixth Circuit refers to the display as a "city-owned and city-sponsored nativity scene," *Id.* at 1567, when they analyzed why this display violated the second prong of the *Lemon* test, the Sixth Circuit focused on both the undiluted religiosity of the display and its location on the lawn in front of the City Hall. *Id.* at 1566. The Sixth Circuit relied primarily on the unaccompanied nature of the Birmingham nativity display in order to distinguish that case from *Lynch*.

In *American Jewish Congress v. The City of Chicago*, 827 F.2d 120 (7th Cir. 1987), the Court of Appeals for

the Seventh Circuit, reversing an unpublished decision by a district court, distinguished the case from *Lynch* because of the location of the creche display. The Court of Appeals found a violation of the effect prong of the *Lemon* test. *Id.* at 127-28. The display consisted of the traditional nativity figures with tree branches behind the scene and some holiday lights strung on those branches for illumination. The Seventh Circuit first took care to distinguish the case before it from *Lynch* on the grounds that "the nativity scene was self-contained, rather than one element of a larger display." *Id.* at 125. Although there were other seasonal symbols and paraphernalia in the vague general vicinity, these other items "cannot reasonably be said to have been part of the 'display.' " *Id.* While the nature of the display was one of the factors which led the Seventh Circuit to distinguish *Lynch* from the case before it, the crucial factor may well have been the location of the creche. The court found that

> Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.
>
> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol—a symbol of government power. The very phrase "City Hall" is commonly used as a metaphor for government. A creche in City Hall thus brings together Church and State in a manner that unmistakenly suggests their alliance. The display at issue in this case advanced religion by sending a message to the people of Chicago that the City approved of Christianity.

Id. at 128. It is important to note that in the case before the Seventh Circuit, as in the case before this court, disclaimer signs were placed next to the display. In *City of Chicago*, six signs, each approximately seven by ten inches were placed around the display, the signs reading "Donated by the Chicago Plasterer's Institute—this exhibit is neither sponsored nor endorsed by the Government of the City of Chicago." *Id.* at 123. However, the Court of Appeals held that the attempt to mitigate the effect of City endorsement of a particular religion was unsuccessful, concluding that "[T]he message of government endorsement generated by this display is too pervasive to be mitigated by the presence of disclaimer. As the district court correctly noted, 'a disclaimer of the obvious is of no significant effect.' " *Id.* at 128 (quoting *American Jewish Congress v. Congress*, No. 85-C-9471 at 14 (N.D. Ill. Dec. 12, 1986) (LEXIS, Genfed library, Dist File)).

The Third Circuit Court of Appeals has recently ruled that a display of religious symbols, in a context quite similar to that in the case before this court, violated the Establishment Clause. *American Civil Liberties Union v. County of Allegheny*, 842 F.2d 655 (3d Cir. 1988), *cert. granted*, 57 U.S.L.W. 3230, (October 3, 1988). In *Allegheny County*, the County had permitted the erection of a nativity display inside the main entrance to the County Courthouse and the City of Pittsburgh granted permission for the erection of a menorah on the steps to the main entrance of the building used jointly by the County and the City. *Id.* at 656. The nativity display consists of the traditional creche figures, is owned by a religious group, and is accompanied by a disclaimer sign reading "This display is donated by the Holy Name Society." *Id.* at 657. Display of the creche involved minimal expenditure of public funds and was displayed for approximately six weeks. *Id.* The menorah is displayed at a joint City-County office building approximately one block from the Courthouse. *Id.* The eighteen foot high menorah is displayed during the

celebration of Hanukkah. *Id.* The Court of Appeals in *Allegheny County* saw the second prong of the *Lemon* test as the key to the issue. *Id.* at 661. It found minimal entanglement between city and state and noted that "A public entity usually is able to articulate some secular purpose for a display." *Id.* at 661-62. However, the Court of Appeals concluded that

> On the other hand the use of a religious symbol is a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement and thereby implicate the second *Lemon* prong as the impact of the display must be judged objectively.

Id. at 662.

Once again, the Court of Appeals was focusing on the location (and the context and meaning invoked by that location) of a display of religious symbols in order to assess the presence of government endorsement. The Third Circuit then went on to identify a group of variables which "a court should consider in determining whether a display has the effect of advancing or endorsing religion." *Id.* at 662. The six variables include inquiries into the location of the display (and the denotations of that location), whether the religious symbols are accompanied by other symbols, and whether there are signs disclaiming the public sponsorship of the display.[8] *Id.* at 662. Treating those variables as the indicia of whether impermissible government endorsement of religion was present, thus triggering a violation of the second prong of the *Lemon* test, the Third Circuit Court of Appeals reversed an unpublished opinion by a district court and found that there was indeed

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[8] The other variables are "the religious intensity of the display," if the display is shown as part of a secularized celebration or holiday, and "the degree of public participation in the ownership and maintenance of the display." *Allegheny County*, 842 F.2d at 662.

a violation of the Establishment Clause. *Id.* at 663. The court based its holding on the finding that

> Each display was located at or in a public building devoted to core functions of government and each was placed in a prominent site at the public building where visitors would see it. Further, while the menorah was placed near a Christmas tree, neither the creche nor the menorah can reasonably be deemed as subsumed by a larger display of non-religious items. In addition, both the creche and the menorah are associated with religious holidays that would be viewed as pertaining to a particular religion. . . . Overall, when the record is evaluated in light of these considerations, the only reasonable conclusion is that by permitting the creche and the memorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.

Id. at 662. The court noted in reaching this finding that its result would have been the same if only either the menorah or the creche been displayed, *Id.* at 662 n.1, and, further, that the use of the disclaimer sign was not efficacious in attempting to dilute or mask the endorsement effect. *Id.* at 662. As noted *supra*, the majority in *Lynch* analogized the Pawtucket creche display to the presence of religious art in publicly sponsored museums. The Third Circuit took care to note that the displays in the case before it did not have a primary effect of edification or pedagogy. They concluded that

> Nor are we concerned with the use of religious objects in a museum or as educational instruments in a classroom, in which circumstances the objects could be presented neutrally. . . . Here, however, the effect was different as it is evident that the religious displays of the City and County

> have the effect of endorsing the messages reflected by the displays. This is unconstitutional.

Id. at 663.[9]

This court has noted the recent grant of a writ of *certiorari* in the *Alleghany County* case, perhaps indicating a willingness to reconsider some parts or all of the reasoning of *Lynch*, as the Third Circuit applied that reasoning to the *Alleghany County* case. However, speculation as to the meaning of the grant of *certiorari* in the *Alleghany County* case is not only fruitless, but contravenes the principle that this court must decide this case on the law as it now perceives the law to be.

III.

In applying the controlling framework of *Lynch* to the case at hand and guided by the persuasive precedents cited above, this court finds that the Jaycees' creche displayed on the County Office Building grounds passes the first and third prongs of the *Lemon* test without a great deal of difficulty.

With reference to the third prong of the *Lemon* test, entanglement, this court finds that the display in the matter before it raises even less of a danger of entanglement than did the display in *Lynch*. Whatever possible threat of entanglement might exist in this case, it surely falls far short of the "comprehensive, discriminating, and continuing state surveillance" or "enduring entanglement" described in *Lemon*. 403 U.S. at 619-22.

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[9] Thus, the displays in *Allegheny County* could not be defended under the sort of pedagogical exception doctrine outlined by the Supreme Court in *Abington School District v. Schempp*. 374 U.S. 203, 225 (1963) ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.")

In turning to the first prong of the *Lemon* test, this court finds that while the evidence regarding the purpose behind the display is not wholly unequivocal, it does not establish, as apparently required by *Lynch*, that a violation of this prong of the *Lemon* test would require demonstrating that no secular purpose at all could be advanced for the display. 465 U.S. at 681 n.6. The president of the Charlottesville-Albermarle Jaycees testified that "these practical considerations [visibility, prominence of the display area, and accessibility to electrical outlets], and not the fact that the location houses the Albemarle County Office Building, motivated the chapter's request that it be able to erect a nativity scene on county property." Stipulations of Fact A-7(b). While the request of the Jaycees cannot be considered "state action," examination of their motivations is useful for the purpose inquiry insofar as it sheds light on the purpose which motivated the defendants and to the extent that the purposes articulated by the Jaycees were, in turn, in effect adopted by the County in granting permission.

Although the testimony of the president of the Jaycees was careful only to cite "practical considerations," the actual request made before the Board of Supervisors is somewhat more equivocal in its overtones. In requesting the County's permission, a representative of the Jaycees stated that

> I feel that by granting us permission, the Board would be giving its local approval towards more Christmas spirit and raising the hopes of the members of our community to be involved. It's a very visible area in town. I dare say that the majority of our residents do pass by it at least one time during the week. . . There are a number of open lots that may be less political or controversial to locate the nativity scene. But they do not provide the exposure or the access to elec-

> tricity for us to illuminate it so that it could be viewed both day and night.

Stipulations of Fact, A-8.

Reading the purposes of the Jaycees as being, to some degree, reflective of the purposes of the defendants, and comparing those against the purposes which the *Lynch* decision held to be legitimate, the court finds that defendants can articulate a secular purpose. In *Lynch*, the acceptable secular purpose of the display was "to celebrate the Holiday and to depict the origins of that Holiday." *Lynch*, 465 U.S. at 681. This court finds it quite reasonable to read the motivations of the Jaycees as expressing, however inchoately, a "secular purpose," as that term is defined in *Lynch*. This court can vindicate the County in the first prong of the *Lemon* test because it is fair to impute to defendants the purposes implicit in the motivations of the Jaycees. It is fair to do so because the defendants, not only by vote, but by the terms of the debate, explicitly adopted those motivations as its purposes and seek, by their action, to support those purposes.[10]

A.

It is the second prong of the *Lemon* test which is ultimately fatal to the creche display by the County. As the Third Circuit noted in *Allegheny County*, it is often the second prong which will prove to be the troublesome inquiry in a state action which violates the Establishment Clause. 824 F.2d at 661. This is because it is usually possible so to structure the state action as to minimize, if not avoid, entanglement between church and state. *Id.* at 662. Furthermore, reasonably skillful actors seemingly need never be tripped up by the purpose inquiry, since the

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[10] *See, e.g.*, Statements of the defendants endorsing the motivations of the Jaycees. Statements of Supervisors Cooke, Way, and Bowie, Stipulations of Fact, A-10, A-11, A-12.

Supreme Court in *Lynch* has allowed even a virtual shard of a secular purpose to vindicate state action on that prong of the *Lemon* test. *Lynch*, 465 U.S. at 681, n.6. Thus, anything short of a pretextual purpose will insulate state action from an Establishment Clause violation based on that prong of the *Lemon* test.[11]

In determining whether the display of the creche on the County Office lawn violated the effect prong of the *Lemon* test, this court "asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This court is fully aware that the rubric of "endorsement" was developed first within the context of a concurring opinion, and not as the majority opinion in *Lynch*. However, this court believes that it is legitimate to utilize Justice O'Connor's rubric in pursuing its inquiry into the second prong of the *Lemon* test.

First, it is important to remember that while her conceptual framework was not developed as a part of the majority opinion, it was developed within the context of an opinion concurring with the majority.[12] Second, the

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[11] It appears that it is necessary for a court to discover the proverbial "smoking gun"—a virtually proselytising purpose—behind the creation of a state program in order for that program to fail the purpose inquiry. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 57 (1985) ("The State did not present evidence of *any* secular purpose.") (emphasis in original).

[12] Justice O'Connor indicated in her concurring opinion that she wrote "to suggest a clarification of our Establishment Clause doctrine" and goes on to assert that "the Court's opinion, as I read it, is consistent with my analysis." *Lynch*, 465 U.S. at 687. (O'Connor, J., concurring). It is fair to conclude that Justice O'Connor saw herself as only clarifying Establishment Clause doctrine, simply sharpening the analytical tools and helping more tightly to focus the appropriate inquiry. "Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device." *Id.* at 689. (O'Connor, J., concurring).

Supreme Court itself has utilized the endorsement inquiry as an analytical tool. In *Wallace v. Jaffree*, the Court indicated that it was using the concept of endorsement in attempting to ascertain whether a "moment of silence" law violated the Endorsement Clause. 472 U.S. 38, 56 (1985). While the state action in question in *Wallace* was disallowed because it was held to violate the purpose prong of the *Lemon* test, the invocation of the rubric of endorsement by the Court suggested that the majority found O'Connor's "clarification" to be a useful analytical tool.[13] The Court also used the rubric of endorsement in the case of *Grand Rapids School District v. Ball* when it stated:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

473 U.S. 373, 389 (1985).

Furthermore, this court is more readily inclined to adopt the test of endorsement because a number of other courts, in particular Courts of Appeal, have also utilized the analytical device first developed by Justice O'Connor. *See Allegheny County*, 842 F.2d at 662; *City of Chicago*, 827 F.2d at 127; *City of Birmingham*, 791 F.2d at 1563. Finally, this court readily uses Justice O'Connor's analytical device because we find it to be an extraordinarily useful, adaptable, and even illuminating analytical device.[14]

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[13] Concurring with the judgment of the majority in *Wallace v. Jaffree*, Justice O'Connor has elaborated further on the concept of endorsement. 472 U.S. at 69-70. (O'Connor, J., concurring).

[14] A number of commentators have also lauded Justice O'Connor's endorsement concept as a useful doctrinal development. *See, e.g.*, Loewy,

Endorsement by the state apparatus of a sect or a religious ideology strikes at the very heart of the guarantees of the Establishment Clause because such endorsement provides a very real threat of the symbolic disenfranchisement of a portion of the community. As Justice O'Connor herself elaborated, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Endorsement of a sect by the government tells those citizens not embraced by the sect that they are either not fully members of the political community or else that their status as full members may somehow be in jeopardy. In order to have an understanding of religious liberty which is at all robust and vital, it is essential to read the Establishment Clause as "forbidding official actions that signify official endorsement or exclusion based on an individual's religious beliefs." L. Tribe, *American Constitutional Law*, 1187-88 (1988). In criticizing a bill before the General Assembly of Virginia, James Madison argued that the establishment which would result from that bill "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Memorial and Remonstrance Against Religious Assessments*, (reprinted in *Everson*, 330 U.S. at 69). For Madison, one of the evil effects of the

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Rethinking Government Neutrality Toward Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight, 64 N.C.L. Rev. 1049, 1051 (1986) ("Besides giving a more precise focus to the purpose and effect prongs of the *Lemon* test, O'Connor's insight emphasizes that government cannot convey a message that anyone is inferior or superior because of his or her religion."). *See also*, Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L.Rev. 303, 358 (1986); Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 Hastings L.J. 155, 162 (1984).

establishment of religion would be to degrade the status of some members of the political community.

Madison's observation is wholly consonant with the perception that led Justice O'Connor to fashion the notion of endorsement. When a government endorses a sect or a religious ideology, it literally "alienates" (i.e., turns into "aliens") members of the *res publica* who are not members of that sect or subscribers to that religious ideology. The upshot of endorsement is that those citizens whose preferences are not endorsed may perceive themselves to be recipients of something akin to a "badge of inferiority."[15] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). Endorsement raises the question of religious adherence in a constitutionally inappropriate way. As Justice O'Connor observed,

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of reli-

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[15] Obviously, the "badge" spoken of in *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), was an indelible badge and the distinction between the insiders and outsiders of the political community after a government endorsement of a religion need not involve such a visible badge or mark of discrimination, although it could if the state violated the Establishment Clause by illegimately requiring public participation in a given action.

One other difference with the majority opinion in *Plessy*—the opinion which coined the term "badge of inferiority—is also readily apparent. That opinion perversely concluded that if blacks believe that "the enforced separation of the two races stamps the colored race with a badge of inferiority," it was "solely because the colored race chooses to put that construction upon it." *Id.* As Justice O'Connor has insightfully noted in her development of the concept of endorsement, the message of exclusion which endorsement carries is a phenomenon which has actual external existence, and is not merely the fevered perception of the aggrieved party. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). This court is concerned not to give inadvertently the impression that either the defendants or the Jaycees intended to impose a badge of exclusion. Indeed, because they did not seek to do so is why defendants' action did pass the first prong of the *Lemon* test.

> gion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch, 465 U.S. at 692 (O'Connor, J., concurring).

The message of exclusion which government endorsement sends is one which strikes at the heart of a guarantee of religious liberty contained within the original provisions of the United States Constitution itself. Section 3 of article 6 establishes that "No religious test shall ever be required as a qualification to any office or public trust under the United States." U.S. Const. art. VI § 3. Surely, the objective of that provision is to keep participation in the political community from being narrowed on the basis of religious adherence. The upshot of Justice O'Connor's analysis is to suggest that such a bulwark against illegitimate exclusion from participation in the life of the political community is also an object of the Establishment Clause. Both this provision of article VI and the no-endorsement understanding of the Establishment Clause are statements about the composition of the American political community, the security of each citizen's status within that community, and their eligibility to participate in that community. There are some constitutionally defensible and morally legitimate grounds for creating criteria, such as age, for certain sorts of participation in the political community. However, obeisance to a state approved or endorsed religious ideology cannot be a legitimate criterion or litmus test for inclusion in the political community.[16] Thus, the problematic effect

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[16] Indeed, this concern is fully consonant with the ideal of freedom of conscience and intellect which lies at the center of our polity. As Justice Robert Jackson observed in one of the more vital statements of our national political "piety," "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

of endorsement is the creation of a defacto establishment through a "symbolic union of church and state." *Grand Rapids School District*, 473 U.S. at 390.

B.

This court finds that the creche displayed by defendants had "the effect of communicating a message of government endorsement." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). In significant ways, the display of the creche in the matter before us differs from the display in *Lynch*. In *Lynch* the nativity scenes was displayed in a setting which was more "neutral" than the lawn of the County Office Building. The setting was a stage without the prominence of governmental buildings and their trappings. The clear symbolic embrace of government found in the matter before us was lacking. It is that symbolic embrace which this court finds to constitute endorsement of a particular religious ideology. Thus, the location of the instant creche, displayed prominently with an unseverable visual association between the trappings of County government and the religious symbols, created the unmistakable message of endorsement. The symbolic embrace present in this case means that the creche displayed by defendants cannot be analogised to a mere museum display, as the Supreme Court found with the creche in *Lynch*. 645 U.S. at 683; *Id.* at 692 (O'Connor, J., concurring). In part, the message of endorsement arises because of the symbolic embrace created by the location of this creche. This creche is also distinguishable from the display in *Lynch* because the display here contained no other seasonal symbols. This court finds persuasive the reasoning of the District Court in New Hampshire which disallowed the display of a privately owned creche on grounds of the municipal government offices, finding that the effect of that display was "the implicit government support of the religious doctrine represented by the sacred figures therein." *Burelle*

v. City of Nashua, 599 F. Supp. 792, 797 (D. N.H. 1984). Both the size and the duration of the display serve to tighten the symbolic embrace of the creche by the trappings of government.

It is important to note that this creche, unlike *Lynch*, 465 U.S. at 671, but like several others, *Allegheny County*, 842 F.2d at 657; *City of Chicago*, 827 F.2d at 123; *City of Birmingham*, 791 F.2d at 1561; *McCreary v. Stone*, 739 F.2d 716, 718 (2d Cir. 1984) *aff'd mem.* by an equally divided court, *sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985); *Burelle*, 599 F. Supp. at 793, is privately owned and privately maintained. Certainly, that serves to undercut somewhat the connection between the government and the display. However, that distancing or disengagement between religious display and government presence which is entailed because the creche is privately-owned is minimal in comparison with the strong visual association between church and state produced by the symbolic embrace. As the district court found in *Burrelle*, "The fact that public monies are not used for such display does not serve to dispel the aura that the municipal government of Nashua has excessively entangled itself with a religious doctrine which is not shared by all of its taxpaying citizens." 599 F. Supp. at 797. Despite the fact that this display survives the entanglement inquiry and even though no public funds were necessary to support this creche the "aura" of endorsement is permeating.

In analyzing this creche under the effect prong of the *Lemon* test, one other feature merits mention. A series of disclaimer signs were erected around the creche, at first one quite inconspicuous and then a second disclaimer sign somewhat less inconspicuous. The presence of even this relatively larger disclaimer sign cannot undercut the endorsement that is apparent. The larger disclaimer sign is still rather small and not easily read. Drivers cannot easily read the disclaimer while passing the scene, the intersection is busy, and it is hardly possible to park or to stop

and read the disclaimer with the care that would be necessary. Thus, the setting and the potential effect of disclaimers is quite different in this case than in *Allen v. Morton*, where that District of Columbia Circuit Court of Appeals identified the possibility of revised disclaimers as mitigating the threat to the establishment clause. 495 F.2d 65, 90-91 (D.C. Cir. 1973). In *Allen*, the display was within a park with ample pedestrian walkways and far more opportunity for those viewing the display to read and assimilate its intended message of dissociation.[17] *Id.* at 78-79.

If the setting in this case been more similar to that decribed in *Allen*, the result would be the same, for even a readily discernible disclaimer would hardly have been sufficient alone. A larger sign, by itself, would not necessarily begin to undercut the strong aura of government endorsement. As the Seventh Circuit Court of Appeals found in *City of Chicago*, "[T]he message of government endorsement generated by this display was too pervasive to be mitigated by the presence of disclaimers." 827 F.2d at 128.

C.

Having determined that display of the creche violates the Establishment Clause, this court next turns to an examination of free speech problems which might be presented by disallowing the display. Defendants argue that a County policy which would, in effect, prohibit this religious display would violate the free speech protections also afforded in the first amendment. It is well established that the government may enforce a content-based regu-

[17] This is not to suggest that, were there more pedestrian access to and pedestrian traffic past the creche on the front of defendants' lawn accompanied by signs which would attempt more effectively to disclaim government sponsorship of the display, then the display necessarily would have been able to avoid its difficulties under the effect prong of the *Lemon* test.

lation on speech in a public forum only when the regulation serves a compelling state interest and is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461 (1980). When the speech in question is religious speech, however, the conflict arises; permitting the speech could violate the Establishment Clause but to disallow speech, even symbolic speech, could entail a content-based regulation, which would require a compelling state interest.

As an initial step in this inquiry, it is necessary to identify the type of forum represented by the lawn in front of the County Office Building. The Supreme Court has identified three types of fora: the public forum, the non-public forum, and the designated public forum. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Traditional public fora are sites such as parks and streets which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). As noted *supra*, there has been some scattered, episodic use of the County Office Building lawn for public activities. However, there is not a long history of the use of this lawn as a forum for free speech activities, especially not under the aegis of its identity as County property. To that extent, its actual history is dissimilar from the history of many of the prime examples of traditional public fora. However, the inquiry about historical use focuses on the history of a *type* of setting, not the specific setting in question. The site's function—the lawn in front of a seat of government—is similar to other settings judged to be traditional public fora. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)(Lafayette Park and Mall); *United States v. Grace*, 461 U.S. 171 (1983)(Supreme Court grounds); *Cohen v. California*, 403 U.S. 15 (1971)(municipal courthouse); *Edwards v. South Carolina*, 372 U.S. 229 (1963)(state capitol grounds).

Whether the lawn can be fairly characterized as a traditional public forum is not dispositive for this analysis because the lawn would certainly also qualify under the rubric of "designated public forum" and the same criteria for the restriction of speech would apply to the designated public forum as to the traditional public forum. *Cornelius*, 473 U.S. at 800 ("[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest."). The lawn in question qualifies as a designated public forum, despite relatively little utilization of that forum, because the County had previously developed a "use policy" for the lawn. The classification as a designated public forum is further strengthened by clear evidence in the deliberations of defendants, who believed that in allowing the creche display they were either creating or furthering the classification of the lawn as such a forum.

The Supreme Court had addressed the conflict between free speech and the Establishment Clause, albeit in a somewhat different context, in *Widmar v. Vincent*, 454 U.S. 263 (1981). In that case, the University of Missouri at Kansas City had denied permission for a registered student group, an organization of evangelical Christians, to conduct religious meetings or services on school facilities. The university adopted a regulation prohibiting the use of school buildings and grounds "for purposes of religious worship or religious teaching." *Id.* at 263. In striking down the regulation, the Supreme Court held that, although the separation of church and state mandated by the Establishment Clause is a compelling state interest, *id.* at 270, a policy of equal access to a public forum does not offend the Establishment Clause if the policy meets the *Lemon* test. *Id.* In the case of that university, the Court found that the secular purpose and entanglement parts of the *Lemon* test would be met by an open-forum policy. *Id.* at 271-72. The effect prong of the *Lemon* test posed more serious

questions, but the Court concluded that an equal access policy would satisfy this element as well. In making this determination, the Court noted that an open forum in a public university "does not confer any *imprimatur* of state approval of religious sects or practices." *Id.* at 274.

Widmar is important to this court's analysis for two reasons. First, it recognizes that complying with constitutional obligations, such as avoiding the establishment of religion, constitutes a compelling state interest. Therefore Albemarle County, along with other governmental units, would have a compelling interest in avoiding violation of the Establishment Clause. Second, the use of public facilities in *Widmar* is quite different from the use of the facilities in the present case. Even the regular use by a religious group of a room in a setting such as a student activities center carries a far different connotation and message than the continuing prominent display of the creche in the matter before us with its tight, symbolic embrace from government. In *Widmar*, there was not the same prominent display of activity, so that an equal access policy does not convey the same associational message.[18]

In *McCreary v. Stone*, the Second Circuit Court of Appeals faced the issue of the interplay between the Establishment Clause and claims of free expression and exercise. The Second Circuit found that the display of a privately-owned creche in a municipal park did not violate the Establishment Clause. The Second Circuit construed

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[18] It does not follow that all the activities covered under a policy like that in *Widmar* must be held *in camera*. The point is rather that the interaction between the setting and the type of display created the message of endorsement in the matter before this court. One of the factors in the display which worked to create that message was the symbolic nature of the speech of the creche, a factor which will be addressed *infra*. In a situation like *Widmar*, there is the expectation of the use of university facilities by a range of different groups, so that the mere presence of a group in such a context will not, *ceteris paribus*, convey the message of state *imprimatur* or endorsement.

Lynch as establishing a sweeping bright line rule that the display of creches does not violate the Establishment Clause. The Second Circuit also dealt with a claim not addressed in *Lynch*, that the equal access rule developed by the Supreme Court in *Widmar v. Vincent* required the display of the creche. The Second Circuit ruled that because of *Lynch*, the equal access rule of *Widmar* controlled on all three prongs of the *Lemon* test, including the primary effect prong:

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the Establishment Clause. As the court noted in *Widmar*, religious benefits derived from the use of an open-access forum are incidental, and the availability of benefits to a broad spectrum of groups is an important index of secular effect."

739 F.2d at 726-27. For two sets of reasons, this court finds that *McCreary* is rather less helpful as persuasive precedent than are the other cases discussed *supra*. First, there are significant factual differences between the nativity display in *McCreary* and the instant display. In *McCreary*, the display did not take place within the context of the trappings of government, it was displayed for a much shorter period of time, and the display itself was much smaller. *Id.* at 720, 721. Second, the *McCreary* court handles the precedents of *Lynch* and *Widmar* in a way that this court does not find to be persuasive. *McCreary* treats lightly the factual specificity that *Lynch* echoed throughout the majority opinion, Justice O'Connor's concurring opinion, and the dissenting opinion by Justice Brennan. *Lynch*, 465 U.S. at 678; at 694 (O'Connor, J., concurring); at 695 (Brennan, J., dissenting).

For purposes of this case the Second Circuit opinion gives less weight than appropriate here to the fact-based limitations of *Lynch* and saw *Lynch* as standing for the broad, unadorned, general principal that creche displays do not violate the effect prong of the *Lemon* test, 739 F.2d at 726-27, even though it sought to hand down a narrow ruling. Id. at 730. Second, the court in *McCreary* saw the Supreme Court's finding in *Widmar* as meaning that the open forum in a public university does not confer any *imprimatur* of state approval on religious sects or practices. *Widmar*, 454 U.S. at 274. The Second Circuit in *McCreary* apparently made the implicit finding that in the context of a public forum, the free speech clause will in most cases "trump" the Establishment Clause. *Widmar*, though hardly unequivocal, indicates that the conclusion of *McCreary* is not compelled. The Supreme Court stated in *Widmar* that the separation of church and state mandated by the Establishment Clause is a compelling state interest. *Id.* at 271.

Access to rooms in student activity buildings or classrooms and their use for religious meetings carry different connotations from the display of the creche on the lawn in front of the County Office Building. In *Widmar*, the message of endorsement was absent but here it is present. What does or does not seem like endorsement will depend in large measure upon the expectations related to the context within which the speech takes place. With a setting like *Widmar*, such as a student activity center or other open fora in a college setting, there is a clear expectation that various groups will use the facilities. Here the display took place at the symbolic center of government. In *Widmar*, the Supreme Court found that no *imprimatur* of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and its relation to the symbolic center of government, the appearance of

a government *imprimatur* upon a certain religious ideology is present.

This court finds that, given the message of endorsement which is communicated by the relationship between the trappings of government and the creche with its religious connotations, no less restrictive alternative than removal of the creche would curtail the impermissible message of government endorsement. The impotence of the disclaimers attached to the creche only reinforces this conclusion. Therefore, this court's decision meets the criteria recognized in *Widmar* for curtailing speech. 454 U.S. at 270. This court cannot perceive a more narrowly-drawn regulation which would permit the placement of that creche on that lawn and still avoid a violation of the Establishment Clause.

IV.

This court has not reached its holding, that the creche in question violates the Establishment Clause, lightly or without a strong sense of concern. In large measure, this is a difficult decision not because of some factual or analytical impediment, but because this court has no wish unnecessarily to interfere with or detract from the celebration of a holiday which is obviously significant on a personal, religious, and financial level to such a large segment of the population. Indeed, as Justice Brennan observed in his dissent to *Lynch*, "After reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable." *Lynch*, 465 U.S. at 696 (Brennan, J., dissenting).

The very familiarity of the Christmas season makes the endorsement harder to detect and the agreeability of the Christmas season may well make observers want either to prefer to avoid seeing the appearance of endorsement or to deny the existence of the endorsement. In the context

of a holiday which so many people find agreeable and so familiar, there is a very strong desire on the part of many to avoid seeing what is a constitutional irregularity. This desire may be especially strong in the present case when this court finds that, in addition to acceptable secular purposes behind the government action, the display of the creche was born out of genuine good intentions. However, the intentions of defendants, even though well meant, cannot blind us to the constitutionally impermissible and far less salutary affect of defendants' action. It is well to remember the note of caution of Justice Brandeis to the effect that citizens need to be even more aware of possible deleterious effects of government actions when government intentions are admittedly benign. He observed that

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

In that context, of course, Brandeis was referring to violations of the fourth and fifth amendments by the government in pursuit of the laudable objective of law enforcement. But Brandeis' worry about the lack of citizen wakefulness in detecting the harmful effects of seemingly beneficent actions by the government suggests that the same kind of caution is appropriate here. As noted, many of those placing creches, both here and at other sites, are certainly well meaning. However, in the case of those creches impermissibly placed, their sponsors do not see the message of endorsement which is the effect of their action. As benign or even as beneficent as the motives may be, our interests protected by the Establishment

Clause are appreciably damaged by the investiture of a potent religious symbol with the secular, civic sanctification of government trappings.

The agreeability of the holiday which tends to blind observers toward violations of the Establishment Clause and the harmful effects of those violations, only serve to make this court take more seriously Justice O'Connor's warning that "Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

A.

The association of a nativity display and the trappings of government which result in the message of endorsement is complicated by the fact that the speech in question is symbolic speech. Analyzing the import of symbolic speech is a trickier inquiry than that of verbal speech. Of course, there is no question about the importance and value of symbolic speech, or that it is protected speech. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971). Symbolic speech clearly can be both vivid and volatile, but it is often less precise than verbal speech and, thus, perhaps more prone to effects such as unintended endorsement. In large measure, this is because the meaning of symbolic speech is so closely tied up with its context. F. Schauer, *Free Speech: A Philosophical Inquiry*, 97-98 (1982). In *Lynch*, the import and effect of the creche were clearly functions of its context. In the case before us, the meaning of the creche and, thus, the message of endorsement which it conveys, are governed by a context including prominent symbols of government on the front lawn of the government building.

Although the Court in *Lynch* referred to the creche as a "passive symbol," 465 U.S. 486, the effect of well-crafted symbolic speech is anything but passive, quiet, or ineffective. As Justice Jackson noted in *Board of Education v.*

Barnette, "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a shortcut from mind to mind."[19] 319 U.S. 624, 632 (1943). The fact that symbolic speech is a "shortcut from mind to mind" means that well-crafted symbolic speech is vivid, but the "shortcut" also means that the effect of the speech may be quite different from the speaker's intent or purpose, viz., the instant defendants had no discernible intent or purpose to send a message of endorsement by permitting the display of the creche, but the effect of the symbolic speech was to send such a message of endorsement nevertheless.

When advising courts to scrutinize carefully the actions of government which acknowledge or celebrate religious events, Justice O'Connor noted that "In making that determination [of an endorsement or disapproval of religion], courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the *myriad, subtle* ways in which Establishment Clause values can be eroded." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)(emphasis added). Since Establishment Clause values can be undercut in ways which are both myriad and subtle and since these potential threats to Establishment Clause values can come in the form of symbolic speech, the danger of a failure to detect a particular

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[19] Justice Jackson does go on to say that symbols have what is seemingly only a subjective meaning. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Barnette*, 319 U.S. at 632-33. While different perceivers can certainly "hear" symbolic speech differently, the meaning of the symbol cannot be merely totally subjective and emotive. A citizen who is, in Justice O'Connor's construct, presented with a message of exclusion from the political community by an action of government endorsement of religion cannot erase or dilute the endorsement effect by redacting the symbol for himself, anymore than one can subjectively recast the "badge of inferiority," as mistakenly suggested by the majority in *Plessy*. 163 U.S. at 551.

message of endorsement is quite real. There is a danger of a dominant culture seeking endorsement of its own sectarian symbols and not seeing that its symbols are sectarian or that they are perceived by those not in that sectarian constituency as instruments of exclusion.[20]

While nonadherents may feel exclusion when the government endorses a particular religious affiliation or ideology, if the adherents of that affiliation or ideology are safely enough ensconced in the dominant cultural motifs, those adherents may be oblivious to the effect of the state's action and may not even recognize, on first reading, the impact of what they are doing. As one commentator has observed,

> A government action permitting some religious practices within public institutions may be seen as an accommodation justified by secular objectives when viewed from the standpoint of the government and the political majority behind it. Those whose creeds benefit from an accommodation may well believe that the action promotes legitimate secular objectives and allows religious values to flourish of their own accord. To persons who do not adhere to the accommodated beliefs, however, the state-sanctioned presence of religion in public institutions may create pressure to conform to majority beliefs, or send messages of exclusion from the community, despite the fact

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[20] If there were limitations in the actual extent of religious liberty in America at the beginning of the republic, it was surely due in some measure to the fact that there was a dominant social and religious culture which, while not monolithic, was still relatively homogeneous. As William Lee Miller has observed in describing that period, " 'Religious Liberty' in that mostly Protestant America had the limitation, perhaps the distortion, that such a general social ideal will have when interpreted by one dominant group, and especially when the group finds the ideal coinciding neatly with its own nature." W. Miller, *The First Liberty: Religion and the American Republic* 232 (1985).

> that these are neither intended nor even perceived by the majority. From the perspective of those whose beliefs are not included in the government's attempts to promote religious freedom and community self-definition, the 'accommodation of religion' may mean state favoritism among creeds or, at a minimum, state-created conditions under which majority creeds achieve *de facto* orthodoxy. For the religious minorities, this is the opposite of accommodation of *their* religions.

Developments of the Law: Religion and the State, 100 Harv. L.Rev. at 1646 (emphasis in original). This court believes that there are two important considerations when examining the effects and dangers of the interaction between symbolic religious speech and government endorsement. The first is the danger of the majority ideology seeming to be the most normal, acceptable, or appropriate ideology. *See, e.g.*, Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L.Rev. 592, 611 (1985)("When the government dons religious robes, those vestments are least visible to those who wear the same colors.") Second, if the danger of endorsement is the danger of a government *imprimatur* given to a particular sect, there may be a greater danger of an unintentional *imprimatur* in the case of symbolic speech, because it is easier for endorsement to slip in through the meaning-giving context of the symbolic speech and to end up with a seeming, if unintentional, endorsement of the content of the belief.[21] In the case before us, the vividness of the

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[21] As a vivid example of endorsement, *see Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). The Tenth Circuit Court of Appeals held that the use of a county seal containing a Latin cross and the motto "*Con Esta Vencemos*" ("With This We Conquer") violated the Establishment Clause. Finding that "an implicit symbolic benefit [to religion] is enough to render the seal unconstitutional, *id.* at

message of endorsement and the concomitant ineffectiveness of the disclaimers show in stark terms the power of symbolic speech. Not only were the disclaimer signs relatively small, but the message of endorsement conveyed by the symbolic embrace of the creche by government simply overwhelmed any attempt to disclaim.

B.

While not essential to the holding, this court nonetheless believes it to be important to make several additional points which will serve to set its decision in context and to describe how circumscribed are the effects of the decision. Within the contours of this matter, the court feels that it can follow, in complete repose, the venerable directive "*fiat justitia, ruat coelum.*" ("Let justice be done, though the heavens should fall.") This court has "done justice" as it interprets the precedents, and it assures those who meet its ruling with some trepidation that the sky will indeed not fall. Contrary to the alarms of many who are deeply critical of recent Establishment Clause jurisprudence, this decision, and the decisions of other courts which are consonant with it, do not bar religion from the public square and do not remove religion from public discourse. *But see, e.g.*, R. Neuhaus, *Naked in the Public Square* (1980). Disestablishment is not a threat to the presence of religion in public life, because what separation exists is a sepa-

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781, the Tenth Circuit described the endorsement danger in this way:

> A person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

Id. at 782.

ration of religion from government, not from politics. Tribe, *American Constitutional Law* at 1276.

Clearly, as at least one commentator has noted, *Lynch* was motivated in large measure by the hallowed place which the former Chief Justice saw religion as having in American life. Howard, *The Supreme Court and the Serpentine Wall*, in The Virginia Statute for Religious Freedom 313-22 (in M. Peterson and R. Vaughn, eds.)(1988). The decision of this court does not remove religion from public life or reflect a devaluing of the role of religion as Chief Justice Burger described it in *Lynch*. This decision only involves what is at most a marginal or incremental geographical restriction on a certain type or display of symbolic speech. There is without question still an entire panoply of fora in the area for the type of symbolic religious speech which is at question in this case.

Litigants seeking to enlarge the scope of government action toward religion permitted by the Establishment Clause seemingly universally quote as a reflex action Justice Douglas' observation that "We are are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). As a descriptive statement that observation is unexceptionable. The religious history of this country forms an essential backdrop to and offers an explanation of the other aspects of this country's history.[22] *See, e.g.*, S. Ahlstrom, *A Religious History of the American People* (1972). It is an extremely large step, though, to turn Justice Douglas' de-

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[22] A number of historians and theologians have identified theological influences at work behind crucial characteristics of our polity. For example, in thinking about theological themes and the Constitution, some historians have noted the prominence of the motif of "law" in Calvinism and, thus, in one of the most important intellectual influences in our early history, the Congregationalists. In particular, one historian has speculated that this could be a root of our enduring national "piety"—our reverence for the Constitution and for law. S. Ahlstrom, *A Religious History of the American People* 348 (1972).

scriptive observation about our intellectual and political antecedents into a normative mandate that the government support various religious sects. And while this first part of Douglas' observations is often quoted, perhaps less often utilized is a point he makes later in the same paragraph: "We [the American people] sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Id.* This second observation of Douglas' seems intent on preserving one of the foundational components of free exercise and establishment values, the principle of voluntarism.[23] *Walz*, 397 U.S. at 694 (Harlan, J., concurring in result).

The intellectual history which is bound up with the creation and the interpretation of the religion clauses of the first amendment show that the Establishment Clause is neither born out of hostility to religion nor will it undercut the potency of American religious life.[24]

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[23] Arguing from a position which is theologically informed, Dean Kelley analogizes the principle of voluntarism to the spirit of "free enterprise," contending that "these practices [e.g., municipal displays of religious symbols] should be rejected as state proprietorships in religion—*prima facie* violations of the principle of free enterprise in the realm of religion." Kelly, *Free Enterprise in Religion, Or How the Constitution Protects Religion and Religious Freedom*, quoted in L. Levy, *The Establishment Clause: Religion and the First Amendment* 117 (1986).

[24] This court is well aware that mere invocation of history alone will hardly serve to solve the issue. *See Lynch*, 465 U.S. at 718-19 (Brennan, J., dissenting); Tribe, *American Constitutional Law*, 1164. This court is also aware that much potential for the misuse of history exists, such as blithely citing detached bits of data or using history to prove too much. *See* H.J. Powell, *Rules for Originalists*, 73 Va. L.Rev. 695 (1987). However, even a cursory examination of some of the intellectual artifacts of the first amendment can serve to diffuse some of the well-meant but overstated fears about the consequences of a judicial decision such as this.

The *amicus* accuses plaintiffs of wanting "to extirpate religion from public life" and of showing hostility to religion. Amicus brief in opposition plaintiffs' motion for summary judgment in support of defendants' cross motion for summary judgment, 32. The *ad hominem* nature of this argument aside, those charges against plaintiffs are not borne out by the record and the amicus' implicit deeper charge, that a separationist impulse in the relationship between church and state is hostile to religion, is also not credible. The urge for disestablishment and the degree of separationism which disestablishment may entail were assuredly not born out of any hostility to religion. The historian Leonard Levy notes that some critics of recent church and state jurisprudence

> seem to have no historical memory. They write about the Establishment Clause as if it were an enemy of religion rather than religion's bulwark, and they convert the Clause into an antithesis of religious liberty, when in fact it is an additional guarantor of the rights of conscience. . . . The Establishment Clause . . . is a legacy not of Deists but of profoundly believing Christians. . .

L. Levy, *The Establishment Clause: Religion and the First Amendment*, 118 (1986).

The disestablishment principle embodied in the first amendment is, on its own terms, a unique act of faith, for it is presumptively different from the more anemic position exemplified by the English philospher John Stuart Mill that religious tolerance exists only through indifference to religion or because of intellectual exhaustion.[25] J.S. Mill, *On Liberty*, 67 (G. Himmelfarb ed.)(1982). The dis-

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[25] "Yet so natural to mankind is intolerance in whatever they really care about that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale." J.S. Mill, *On Liberty*, 67 (G. Himmelfarb ed.)(1982).

establishment principle reflects an American commitment that religious liberty is possible without devaluing the place of religion in public life, withou' a cooling of religious fervor, and with a continued appreciation of religious diversity. On the contrary, the disestablishment of religion is a prime factor in the health, vitality, and variety of American religious life.[26] James Madison argued persuasively that religion is more vital when disestablishment is the rule. "[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (reprinted in *Everson*, 330 U.S. at 67). In Madison's view, it is not the disestablishment of religion—the separation of religion from government and its trappings—which threatens religious vitality, but rather a regime of fullbodied establishment, like the Constantinian captivity of Christianity which would imperil our religious health.[27]

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[26] *See e.g.*, the conclusions of historian Leonard Levy: "Because the domains of religion and government remain separated, religion in the United States, like religious liberty, thrives mightily, far more than it did 200 years ago, when the vast majority of Americans were religiously unaffiliated." Levy, *The Establishment Clause* 181.

[27] As David Little, a scholar of American religious history, has noted,

> For Jefferson and Madison, on the contrary, established religion of any sort contributes to the moral and civil corruption of the social order. It predictably produces "hypocrisy, injustice, intemperance, immoderation, tyranny, and intolerance"—hardly the sort of civic behavior necessary for preserving and edifying a free society.
>
> . . . [T]he basis for "the vital Principles of republican Government," the principles of "Justice and Virtue," derive not from a common religion, but from the common respect of all citizens and the common design of all public institutions for protecting the free exercise of diverse religious and even nonreligious and irreligious expression. Such an idea is avowedly the implication of Jefferson and Madison's

See, A.E.D. Howard, I *Commentaries on the Constitution of Virginia*, 288 (1974).[28]

Surely, some citizens will regret this court's decision and ask, with the best of intentions, why something as seemingly innocuous, and, to their perception, as unobtrusive as this creche cannot be displayed on the County Office Building lawn. They may feel that, even if it is in

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doctrine of the sovereignty of conscience.

Little, *Religion and Civil Virtue in America*, in The Virginia Statute for Religious Freedom 244 (M. Peterson and R. Vaughan, eds. 1988).

[28] At this point it may be appropriate to note that those concerned with the vindication of religious liberty in this Commonwealth have recourse to resources other than the United States Constitution. In particular, the Supreme Court has noted that state constitutions may provide protections for civil liberties more expansive than the protections provided by the United States Constitution. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The protections afforded by the United States Constitution must be considered a floor, so that no state constitution may be read to afford protections less potent than those contained in the federal constitution. However, the guarantees of the federal constitution are not a ceiling. A state's own history will affect its constitutional provisions regarding religion and the doctrinal possibilities which such a provision will spawn. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873, 909 (1976). In addition, the willingness and ability of state courts to fashion state constitutional remedies is in large part a function of the specificity and robustness of that state constitution's own religion clause. Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provision*, 71 Va. L. Rev. 625, 653 (1985). Forty-one years ago in its *Everson* decision, the Supreme Court read the Virginia Bill for Religious Liberty as being identical in its protections with the first amendment. *Everson v. Board of Education*, 330 U.S. 1 (1947); Va. Const. art. I § 16. However, as one commentator has noted, "So many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginian sources that it is not surprising if the Virginia courts see Virginia's religious guarantees as having a vitality independent of the federal Constitution." A.E.D. Howard, I *Commentaries on the Constitution of Virginia* 303 (1974).

some sense what they might term a "technical" violation of an Establishment Clause, it surely is only a trivial or insignificant violation and that such violation should not prevent the goodwill which they believe this display engenders. An answer to this concern would simply be to cite *Widmar* and note that a state has a compelling interest in preventing a violation of the Establishment Clause. *Widmar*, 454 U.S at 271.

The well-intentioned concern, though, perhaps merits several deeper responses. First, this court would note that whether a violation of the Establishment Clause seems trivial will be due in large part to the perspective of the observer. A member of a religious or cultural majority or an adherent of the sectarian belief being endorsed by the state may well fail to see what the fuss is all about. To that extent, it may well be fair for those feeling exclusion through state endorsement of a religious ideology to ask those comfortably ensconced within that ideology to attempt to appreciate, if they cannot share, the perspective of the one excluded by the government endorsement.[29] Because through the symbolic embrace of a potent religious symbol by the trappings of government, the government sends out a message of endorsement of a particular religious affiliation or cluster of affiliations, the case at hand is not a *de minimis* or trivial violation of the Establishment Clause.[30]

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[29] One commentator has suggested that "In deciding whether a government practice would impermissibly convey a message of endorsement, one should adopt the perspective of a non-adherent; actions that reasonably offend nonadherents may seem so natural and proper to adherents as to blur into the background noise of society." L. Tribe, *American Constitutional Law*, 1293.

[30] As a prominent historian of church and state has observed, "Whether a practice seems *de minimis* may depend on the perspective from which it seen. What is trifling to the majority may be threatening and offensive, even persecuting, to a minority." Levy, *The Establishment Clause* 177.

There may be some putative or ostensible entanglements between church and state which, when put in context, are truly *de minimis*. Some religious symbols have become less potent and some practices which might have once had the potential to be divisive or pernicious have been declawed. As Justice Brennan noted in his dissent in *Lynch*,

> I would suggest that such practices as the designation of 'In God We Trust' as our national motto or the references contained in the Pledge of Allegiance to the Flag can best be understood . . . as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

Lynch, 465 U.S. at 716 (Brennan, J., dissenting). In similar fashion, the Fourth Circuit Court of Appeals has noted that the sort of practices referred to by Justice Brennan have lost their "potentially entangling theological significance," *Hall v. Bradshaw*, 630 F.2d 1018, 1023 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), and "In a very real sense they may be treated as 'grandfathered' exceptions. . . ." *Id.* at 1023, n.2. The Fourth Circuit identifies the members of this "grandfathered" class as those "Present at the very foundations, few in number, fixed and invariable in form, confined in display and utterance to a limited set of official occasions and objects, [which] can safely occupy their own small unexpandable niche in Establishment Clause doctrine." *Id.* at 1023, fn. 2. The display in question in this matter differs substantially from the "grandfathered" class described by the Fourth Circuit, for creches were hardly present at the very foundation of the Republic,[31] the display in question is neither formulaic

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[31] For a survey of the variegated history of Christmas celebrations in this country and an indication of how relatively young are many of the seasonal practices assumed to predate this country, *see Lynch*, 465 U.S. at 720-25 (Brennan, J., dissenting).

in the sense that a national motto is, nor is it frozen nor limited. This delimited class described by the Fourth Circuit is a group of practices whose effects are clearly circumscribed and are not expansive, like the message of endorsement communicated by the crēche being displayed on the front lawn of the County Office Building.

While the impact of the endorsement at work in this case is not trivial, this court recognizes that there could be points of connection between church and state which are truly *de minimis*, in terms of an Establishment Clause violation. In attempts by citizens of goodwill to seek a relationship between church and state which promotes a fertile ground for religious liberty for all citizens (or from freedom from religion, if the citizen so elects) there is some room for compromise, for seeing some suits as *de minimis* and for not always seeking confrontation or adjudication.[32] This court sincerely hopes that those who would be involved in legal, political, or intellectual efforts to shape the relationship between church and state will appreciate the difference between suits of import and "silly suits."

V.

In conclusion, this court finds that the display of the creche was a violation of the Estabishment Clause and grants plaintiffs' motion for summary and declaratory judgment.

An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge

November 9, 1988
Date

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[32] Indeed, Leonard Levy, in his defense of a separationist view of church and state, readily concedes that there are "some silly suits" and that there are times, in his homely phrase, that we should "let sleeping dogmas lie." Levy, *The Establishment Clause* 177.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 87-0068-C
Civ OB #21, p. 76

CLERK'S OFFICE U.S. DISTRICT COURT
AT CHARLOTTESVILLE, VA.
FILED

NOV 9 1988

Joyce F. Witt, Clerk

By /s/ V. Harris
Deputy Clerk

JUDGE JAMES H. MICHAEL, JR.
ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. Plaintiffs' motion for summary judgment shall be, and it hereby is, granted.

2. Defendants' motion for summary judgment shall be, and it hereby is, denied.

3. This action shall be, and it hereby is, dismissed and stricken from the docket of this court.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

November 9, 1988
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 87-0068-C

REV. WILLIAM S. SMITH, *et al.*,

Plaintiffs

v.

TIMOTHY LINDSTROM, *et al.*,

Defendants

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

The matter before the court at this point relates entirely to the motion for a preliminary injunction filed by the complainants herein. It is consequently proper to focus the attention at this time on those factors which are taken into consideration in deciding whether a preliminary injunction should issue.

Background

As a preliminary matter, the parties have filed with the court a Stipulation of Facts which the court accepts and adopts as the Findings of Fact for this opinion, as far as those Stipulations of Fact go. For ease of reference, a copy of the Stipulation is appended to this opinion.

Turning now to the law governing this motion, the court believes that the seminal case in the Fourth Circuit is that of *Blackwelder Furniture Co. of Statesville, Inc. v. Selig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977), where the Court of Appeals for the Fourth Circuit instructs that the trial court's decision on the question of a preliminary injunction turns on an analysis of four factors: the prospect of irreparable harm to the plaintiff, the likelihood of success for the plaintiff on the merits, the harm to the defendant, and the public interest. These factors have been further refined in the opinion in *North Carolina State Ports Authority v. Dart Containderline Co., Ltd.*, 592 F. Supp. 749 (4th Cir. 1979), where the Court of Appeals for the Fourth Circuit indicated a sort of sliding relationship between irreparable harm to the plaintiff and likelihood of success for the plaintiff, indicating that where the harm was irreparable to the plaintiff, there was less necessity for a stronger showing of likelihood of success on the merits.

I.

Taking these factors into account, the court turns first to the likelihood of irreparable harm to the complainants. Here, the analysis is governed by the opinion of the Supreme Court in *Elrod v. Burns*, 427 U.S. 347 (1976). In that case, involving issues of freedom of speech, the district court had held that there was insufficient showing of irreparable injury to the plaintiff. The court of appeals reversed, and the sheriff, defendant in the district court, appealed to the Supreme Court. There, the Supreme Court

affirmed the court of appeals, in a lengthy opinion, a pertinent portion of which is to be found at page 373, where Mr. Justice Brennan stated, "The loss of first amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Citations omitted.) Subsequent cases have not modified the proposition that deprivation of such first amendment rights for minimal periods of time constitutes irreparable injury.

If the complainants are correct in their assertions in the complaint, then it must be concluded, under the logic of *Elrod*, that irreparable injury is shown.

II.

Turning to the second consideration to be evaluated, namely, the likelihood of success on the part of the complainants, it should be noted that, having concluded that irreparable harm is shown if the complainants are right, then there is a lesser burden on the complainants to show the likelihood of success than would otherwise be the case. *See, North Carolina State Ports Authority, supra.* Pertinent to the consideration of this question is the Stipulation of Facts noted above, which, in essence, covers the basic facts underlying this controversy. However, the court is concerned that there are matters which need to be brought before the court in determining the question of likelihood of success.

In the complaint, one of the grounds asserted for challenging the action of the Board of Supervisors of the County of Albemarle in permitting the placing of this creche in front of the County Office Building is the assertion that the County disregarded its own regulations in processing the request for permission to do so. That is, a number of years ago, the County adopted a fairly detailed and specific regulation concerning the manner in which such requests for spaces, principally in buildings, owned and occupied by the County, would be treated and, in

appropriate cases, space made available to others how wished to use those spaces. While the regulation is not totally clear, it certainly may be interpreted to include all property under the control of the Board of Supervisors, rather than simply the buildings with which the major thrust of the regulation deals, and, according to the argument of the complainants, is the sole purpose of the regulation. Upon a careful reading of the regulation, the court disagrees with this proposition, finding that the regulation may well be interpreted to cover all of the property under the control of the Board of Supervisors.

In light of the portion of the complaint challenging the procedure by which this permission was granted, one area which this court feels must be further developed is how the request for authority to place the creche in its present location came to be heard by the Board of Supervisors, when the regulation adopted for such matters committed the decision to the discretion of the County Executive. From the stipulation of facts, it is apparent that the question came, so far as can be told from the record at this point, directly to the Board of Supervisors, with no indication of any action by the County Executive, or any compliance in that respect with the terms of the regulation. While this fact may or may not be critical to decision, it nonetheless needs to be fully explored before any determination is reached on the likelihood of success.

Another area which this court feels must be further explored relates to the comment made by one of the Supervisors to the effect that, while he was voting for permission to place the creche on the County grounds, he would vote against any future application where he did not like the particular tenor of any message advanced by the applicant. While this is unquestionably a present statement of future intent, which may or may not eventuate in a vote in that fashion by the Supervisor, the comment, while direct and pointed by the Supervisor, is nonetheless enigmatic as to the remainder of the Board. Obviously,

this is a matter for considerable significance in this case, having in mind the fact that the Board of Supervisors maintains, by strong inference, that the location where the creche is placed is a public forum, and, under well-understood rules, open to any group, with no basis for exercising any content censorship, other than the usual time, place, and manner restrictions which are clearly recognized in the case law. *See Police Department of Chicago v. Moseley*, 408 U.S. 92 (1972); *Widmar v. Vincent*, 454 U.S. 363 (1981).

III.

Turning to the third element to be considered, the court must look to the question of harm to the respondents in this case. Again, the logic and language of *Elrod* are instructive. It is fair to say that the logic of *Elrod* cuts in both directions. Here, if the respondents are right in their position, requiring them to remove the creche would put them in the position of exercising a content censorship which would fall afoul of the right of the Board of Supervisors to provide a public forum for expressions of speech. In other words, requiring the County to cause the dismantling of the creche would, assuming the respondents' argument is correct, cause the County to engage in a content discrimination or content censorship which would deprive those whom the the Board of Supervisors had permitted to put up the creche of their right to freedom of expression, there being no issue here involved in determining whether any time, place, or manner restrictions have been violated.

A difficult point in this analysis lies in the fact that the Board of Supervisors, as a governmental entity, in all probability has no particular rights under the first amendment to freedom of expression. However, the organization which has sponsored the creche definitely does have such rights, but that organization is not a party to this litigation. This is resolved, however, when one considers that the County's

action may impinge on those who do have rights under the first amendment. In brief, this court should not, by virtue of imposing a duty on the Board of Supervisors to take certain action, by that action cause an impairment of the rights to freedom of expression of those who are vested with that right under the first amendment. Thus, again assuming that the respondents are right in their position, granting the injunction could very well, under the dictates of *Elrod*, cause harm to the respondents.

IV.

Turning to the final element to be considered, namely, the public interest, a surface inspection of the pleadings would indicate that there is strong public interest on both sides of the question, with numerous complainants, and numerous intervenors as *amici curiae* in opposition to the complainants. However, such a surface analysis does not comport with the requirements of the case law. It is certainly in the public interest to assure that the mandates of the Constitution are obeyed by all. However, as indicated in the discussion of the irreparable harm to the complainants and harm to the respondents, it appears that the public interest would have to be considered to be in balance on this element. That is, if the complainants are right, then the public interest is strongly in favor of the granting of the injunction. On the other hand, if the respondents are right, the public interest is strongly in favor of denying the injunction. It is tempting to refer to this as a "wash," but it perhaps is more fitting in an opinion to indicate that, until the merits are determined, the matter is in balance on the question of the public interest.

Several other matters need to be spoken to at this stage. First, it should be clearly understood that the decision on the question of an issuance of a preliminary injunction is based solely on the record presently before the court, together with the arguments of counsel. As indicated, the

court feels that there is a necessity further to amplify this record, and to state in considerably greater detail what the procedures were which led to the grant of permission to erect the creche, and to answer such other questions called for in resolving the issue but not now resolved on the present record.

A second point of considerable importance relates to the status of this area as a "traditional public forum." The court is of opinion that the grounds surrounding a seat of government traditionally have been regarded as a public forum, and may properly be so regarded in this case. The governmental entity has occupied this building and the space surrounding it for some five years, and, so far as the record reveals, there had been no previous expressions of speech in this area, though the area has been used from time to time as an assembly point for various units participating in parades, etc. The fact that the area has not previously been used for expressions of speech of the nature challenged in this case is not determinative, however. The span of time in which such expressions could have taken place is relatively short. Further, as shown in the copy of an except from its minutes, contained in the record, the County Attorney clearly advised the Board of Supervisors that granting the request before it would amount to having the space "dedicated as a public forum." With that knowledge clearly before it, the Board granted the request. Under these circumstances, the court has no difficulty in concluding that the space surrounding the County's seat of government can and does constitute a public forum.

In considering this matter, the court has given thought to whether deferring any decision on the merits until the removal of the creche would render moot an opinion on the merits in this case. Such removal is planned for January 10, 1988, according to the statement of the county Executive at the Board meeting approving the request. It is the court's conclusion that this would not be a result

of deferring the decision, since this particular matter is one of those falling within the "capable of repetition, yet avoiding review" doctrine. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), *Finberg v. Sullivan*, 634 F.2d 50, 55 (3d Cir. 1980). Because that is the case, the court has no hesitancy in proceeding to consider this matter on the merits, whether before or after the removal of the creche in question.

As a final point, it should be noted that nothing in this opinion is to be taken as indicating or even intimating any conclusion as to the decision on the merits in this case. Such decision must rest on a full development of the record.

The issues raised in this case are thorny, indeed. Because of the factual differences between this and the Pawtucket, Rhode Island, case, *Lynch v. Donnelly*, 465 U.S. 668 (1983), this court cannot conclude that the rationale of the *Lynch* case regulates the decision in this matter. The immediate difference in this case is that the creche standing alone, as distinguished from the series of exhibits, etc. in the *Lynch* case, simply make the *Lynch* case factually inapposite in these circumstances.

The right to freedom of expression is not an absolute right. It may be delimited by appropriate time, place, and manner restrictions imposed in the least restrictive way to accomplish a legitimate governmental interest. In this case, as the court indicated from the bench, the question becomes whether the exercise of the right to freedom of expression in this case so transgresses the establishment cause of the first amendment that it is not permissible. This must be decided essentially after a full development of the factual bases for the positions of the parties.

The court has on several occasions indicated that it makes its analysis in terms of whether the complainants or the respondents are right in their positions. As indicated

in the discussion of the likelihood of the complainants to prevail, the court presently simply is not able to determine whether the complainants have greater likelihood of success. Such a decision must await a fuller development of the record.

For the reasons indicated, the motion for preliminary injunction is denied. The case will proceed on the merits as promptly as dates may be arranged with counsel and the court.

An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge

29 December 1987
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CIVIL ACTION NO. 87-0068-C

REV. WILLIAM S. SMITH, *et al.*,

Plaintiffs

v.

TIMOTHY LINDSTROM, *et al.*,

Defendants

ORDER

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that complainants' motion for a preliminary injunction shall be, and it hereby is, denied.

The clerk is hereby directed to send a certified copy of this Order, and the accompanying Memorandum Opinion, to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

29 December 1987
Date

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2973

WILLIAM S. SMITH; PAULA KETTLEWELL; WAYNE B. ARANSON; JAMES J. BAKER; DANIEL S. ALEXANDER; DOUGLAS W. KANNEY; JAMES W. PENCE; B. ELIOT SINGER; JEAN M. QUIGLEY; CYNTHIA K. DAVIS

Plaintiffs - Appellees

and

JAMES F. MCDONALD

Plaintiff

v.

COUNTY OF ALBEMARLE, VIRGINIA;

Defendant - Appellant

NORTHSIDE BAPTIST CHURCH; LIVING HOPE CHAPEL; MARANATHA CHRISTIAN FELLOWSHIP; PROVIDENCE FOUNDATION; REVEREND WILLIAM TEMPLETON; REVEREND RICHARD A. WHITTAKER; REVEREND GREG R. DAVIS; REVEREND RUSSELL STROUP; LOIS G. STROUP; REVERNED LEWIS D. TEMPLEMAN; REVEREND RALPH S. CARTER; REVEREND MARK A. BELILES; STEPHEN K. MCDOWELL; NORMAN T. BRINKMAN; GEORGIA C. BRINKMAN; BILL KINCAID; ANNE KINCAID; RONALD J. GILBERT; ANN S. GILBERT; THOMAS W. GILLIAM; DIANE GILLIAM; MICHAEL A. COFFEY; DEBRA B. COFFEY; RICHARD H. RUBENOFF; LYNN RUBENOFF; SHEILA RICHARDSON; REVEREND JOHN MANZANO; REVEREND CURTIS L. GIBSON; EILEEN D. GIBSON; SUSIE S. K. WALDRON; ELIZABETH PARROTT; MARK L. MARHOEFER

Amicus Curiae

and

TIMOTHY LINDSTROM; JOSEPH HENLEY; EDWARD H. BAIN, JR.; PATRICIA COOKE; RICHARD BOWIE; PETER WAY

Defendants

CORRECTED ORDER

On Petition for Rehearing with Suggestion for Rehearing In Banc

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FILED

MAR 28 1990

U.S. Court of Appeals
Fourth Circuit

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Murnaghan and Judge Sprouse voted not to rehear the case. Judge Blatt, sitting by designation, voted to grant rehearing.

In a requested poll of the Court on the suggestion for rehearing in banc, Judge Russell, Judge Widener, and Judge Wilkins voted to rehear the case in banc. Chief Judge Ervin, Judge Hall, Judge Phillips, Judge Sprouse, and Judge Murnaghan voted against rehearing in banc. Judge Chapman and Judge Wilkinson recused themselves.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan.

FOR THE COURT,

/s/ JOHN M. GREACEN
CLERK

APPENDIX E

Charlottesville—Albemarle Jaycees
P.O. BOX 961 CHARLOTTESVILLE, VIRGINIA 22902

2 December, 1987

Mr. Guy Agnor
County Board of Supervisors
County Office Building
401 McIntire Road
Charlottesville, Va. 22901

Dear Mr. Agnor,

It is respectfully requested that the Albemarle County Board of Supervisors addend their agenda for tonights Board of Supervisors meeting to allow the Charlottesville-Albemarle Jaycees time to present the Nativity Scene request to the Board of Supervisors. Thank you very much for your assistance and cooperation with this issue.

Respectfully,

/s/ David Schmidt
David Schmidt
Co-Chairman Nativity Scene
Charlottesville-Albemarle Jaycees

Attachment #4
Distributed to Board: 12/2/87
Agenda Item No.: 87-1202-363

Charlottesville—Albemarle Jaycees
P.O. BOX 961 CHARLOTTESVILLE, VIRGINIA 22902

Mr. Guy Agnor
County Board of Supervisors
County Office Building
401 McIntire Road
Charlottesville, Va. 22901

27 November, 1987

Dear Mr. Agnor,

On behalf of the Charlottesville-Albemarle Jaycees I would like to express our sincere appreciation to yourself and the Albemarle County Board of Supervisors for considering the Albemarle County Office Building Lawn as a potential sight for our Nativity Scene. To aid in the board's final decision, the following information is supplied.

All of the figurines used in the Nativity Scene are constructed from plywood that has been shaped and painted to depict the characters associated with Christ's birth. While numerous organizations have utilized live animals, we feel that it would be inhumane to restrict live animals for the period of time that our Nativity Scene is displayed. As such, your concerns about live animals being involved may be put to rest. The only disturbance to the sight location would be three holes measuring $2^1/_2$" wide by 4" in length by 8" in depth. These are produced when driving the two by four's into the ground to secure the three Wise Men. If filling these holes in afterward would not satisfy keeping the lawn well manicured, we could devise some other method to secure the Wise Men from being blown over during windy periods. The only other disturbance I forsee would be the use of straw in the cradle and inside the manger itself. This is easily raked up after the Nativity Scene has been dismantled. Both Mr. Winslow III and myself check the Nativity Scene daily to insure that it is clean of debris and displayed properly. If there are any

other concerns that we may address please feel free to call upon either of us.

In formalizing our request, please consider the following. First it is hoped that we may place the Nativity Scene on the corner of the Albemarle County Office Building Lawn adjacent to the intersection of Preston Avenue and McIntire Road. We will position the Nativity Scene so that all traffic passing through the intersection may have a clear view of the Nativity Scene. Secondly, we would be grateful for the use of a 110-Volt outlet in which to hookup two floodlights for night illumination. Most assuredly our floodlights and connections will be up-to-code and safely maintained. Our preferred time frame for displaying and subsequently dismantling the Nativity Scene is from December 6th, 1987 through January 10th, 1988. Again I would like to thank the Albemarle County Board of Supervisors for their time and consideration in this matter. I may be contacted at either 295-5113 (W) or 973-6509 (H). Mr. Leonard Winslow III may be reached at either 293-8181 (W) or 296-0123 (H).

Respectfully,

/s/ David Schmidt
David Schmidt
Co-Chairman Nativity Scene
Charlottesville-Albemarle Jaycees

Distributed to Board: 12/2/87
Agenda Item No.: 87-1202-36

COUNTY OF ALBEMARLE
Parks and Recreation Department
COUNTY OFFICE BUILDING
401 MCINTIRE ROAD
CHARLOTTESVILLE, VIRGINIA 22901-4596

296-5845

APPLICATION FOR RESERVATION OF ALBEMARLE COUNTY PARKS & RECREATION BUILDINGS & GROUNDS

I (we) David Schmidt and Leonard Winslow III representing the (organization) Charlottesville-Albemarle Jaycees have read the attached rules and regulations and in accordance with same, I (we) hereby make application for the use of Front Lawn - County Office Building (space wanted) on 12/6/87-1/10/88 (date), between the hours of full time under the conditions indicated below:

(1.) The exact purposes for which the space will be used and any special equipment, (chairs, tables, etc.), desired to be used, are: Construction and display of Nativity Scene - Access to 110 volt outlet is requested

(2.) Number of persons expected: N/A

(3.) The following person or persons will be in charge of the program and their telephone number (weekday # & weekend #): Mr. Leonard Winslow III 293-8181 W, 296-0123 H and David Schmidt 295-5113 W, 973-6509 H

(4.) The schedule of admission charges will be as follows: N/A

(5.) The proceeds from such charges will be distributed and used as indicated below: N/A

It is understood and agreed that, if this application is approved, the undersigned and the above organization will

be responsible for all damage to property and will protect and indemnify the County of Albemarle from all liability to any person on any account in connection with the above use of County property.

Signed: David Schmidt 12-8-87
(applicant)

Jaycees will be responsible for cleanup, filling of holes, etc. Also Jaycees will pay for utility usage. (3-150 watt bulbs for 189 hours)

ACTION TAKEN

(1.) (x) Approved for use of front lawn on 12/6/87-1/10/88

(2.) The total charge for use of the property will be $6.80

(3.) Extra charges for rehearsals will be $N/A for each rehearsal.

(4.) ( ) Disapproved. Reason for disapproval _____

Signed: County of Albemarle
By: /s/ Patrick X. Mullaney
Parks & Recreation Department
Representative

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

Civil Action No. 87-0068(C)

REVEREND WILLIAM S. SMITH, *et al.*,
Plaintiffs,

v.

TIMOTHY LINDSTROM, *et al.*,
Defendants.

STIPULATIONS OF FACT

For the purpose of the Summary Judgment determination by this Court in this cause, the parties hereby stipulate to the following facts:

1. Plaintiff The Reverend William S. Smith is Pastor of Westminster Presbyterian Church in Charlottesville, Virginia, and is a resident, taxpayer and voter in the City of Charlottesville, Virginia.

2. Plaintiff The Reverend Paula Kettlewell is an Episcopal Priest in the Diocese of Virginia, Associate Rector of St. Paul's Episcopal Church in Charlottesville, Virginia, and a resident and taxpayer of the City of Charlottesville.

3. Plaintiff The Reverend Wayne B. Arnason is the Minister of Thomas Jefferson Memorial Church, Unitarian Universalist, in Charlottesville, Virginia, and is a resident and taxpayer of the City of Charlottesville.

4. Plaintiff The Reverend James J. Baker is Associate Pastor of Westminster Presbyterian Church in Charlottes-

ville, Virginia, and is a resident, taxpayer and voter of the City of Charlottesville.

5. Plaintiff Rabbi Daniel S. Alexander is the Director of the B'nai B'rith Hillel Foundation at the University of Virginia, Charlottesville, Virginia, and is a resident, taxpayer and voter of the City of Charlottesville.

6. Plaintiff The Reverend Douglas W. Kanney is the Minister of Wesley Memorial United Methodist Church, Charlottesville, Virginia, and is a resident, taxpayer and voter of the County of Albemarle, Virginia.

7. Plaintiff The Reverend James F. McDonald has requested to withdraw as a plaintiff because of a change of employment.

8. Plaintiff Pastor James W. Pence is the Campus Pastor, St. Mark Lutheran Church, University of Virginia, Charlottesville, Virginia, and is a resident, taxpayer and voter of the County of Albemarle, Virginia.

9. Plaintiff B. Eliot Singer is a resident, voter and taxpayer of the County of Albemarle and is of the Jewish faith.

10. Plaintiff Jean M. Quigley is a resident and taxpayer of the County of Albemarle.

11. Plaintiff Cynthia K. Davis is a resident, voter and taxpayer of the County of Albemarle, Virginia, and is of the Episcopal faith.

12. Defendant Timothy Lindstrom is an elected Supervisor of the County of Albemarle, Virginia and as such participates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit. His individual vote was to deny permission.

13. Defendant Joseph Henley is an elected Supervisor of the County of Albemarle, Virginia and as such partic-

ipates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit. His individual vote was to deny permission at this specific location.

14. Defendant Edward H. Bain, Jr. is an elected Supervisor of the County of Albemarle, Virginia and as such participates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit.

15. Defendant Patricia Cooke is an elected Supervisor of the County of Albemarle, Virginia and as such participates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit.

16. Defendant Richard Bowie is an elected Supervisor of the County of Albemarle, Virginia and as such participates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit.

17. Defendant Peter Way is an elected Supervisor of the County of Albemarle, Virginia and as such participates in making binding policy decisions on behalf of the County. He was one of the six supervisors whose vote permitted the erection and maintenance of the Christian Nativity Scene at issue in this lawsuit.

18. Defendant County of Albemarle, Virginia, is a political subdivision of the Commonwealth of Virginia, whose municipal policy of permitting the erection and maintenance of the Christian Nativity Scene is at issue in this lawsuit.

19. Immediately prior to December 2, 1987, a private organization known popularly as the Jaycees requested permission from the Board of Supervisors of the County of Albemarle, Virginia, to erect and maintain a Christian Nativity Scene on the front lawn of the Albemarle County Office Building.

20. On December 2, 1987, the Defendant Supervisors, acting in their capacities as elected representatives of the people of Albemarle County and on behalf of Defendant County, voted 4-2 to grant permission to the Jaycees to erect and maintain the requested Christian Nativity Scene on the front lawn of the Albemarle County Office Building.

21. On December 6, 1987, the Jaycees erected the Christian Nativity Scene on the front lawn of the Albemarle County Office Building, where it remained until January 10, 1988.

22. The Defendant County owns and has authority, dominion and control over the use of the front lawn of the Albemarle County Office Building.

23. The Albemarle County Office Building is the seat of County government, has the words "Albemarle County Office Building" displayed prominently on the front of the Building behind the Christian Nativity Scene, and has both the American flag and flag of the Commonwealth of Virginia behind the scene.

24. The Christian Nativity Scene covered an area of approximately five hundred square feet, contained figures approximately seven feet tall, a manger approximately nine feet tall, twelve feet deep and twenty feet wide, was located at one of the busiest intersections in Charlottesville, and at the time of its initial erection, was not accompanied by any explanatory signs or disclaimers; after its original erection, signs or disclaimers were added to the vicinity of the Christian Nativity Scene.

25. The Christian Nativity Scene was lighted at night exposing it to public view twenty-four hours a day.

26. The Christian Nativity Scene as exhibited was viewed by the Plaintiffs as a purely Christian religious symbol, signifying the birth on earth of Jesus Christ, the Son of the Christian God, one of the central tenets of the Christian faith.

27. From November 1, 1987 through January 15, 1988, there were no other symbols present on the front lawn of the Albemarle County Office Building

28. From December 6, 1987 through January 10, 1988, there were no other symbols of the Christmas season present on the front lawn of the Albemarle County Building.

29. Plaintiffs were offended and claim they have been irreparably injured by what they interpret to be the prominent appearance of County government sponsorship of, endorsement of and preference for the Christian faith.

30. At all times in taking the above-described actions, the Defendants were acting under color of state law, and pursuant to the municipal policy and authority of the government of the County of Albemarle.

31. The photographs attached to the Stipulations of Fact submitted with Plaintiffs' Motion for Preliminary Injunction are true and accurate representations of the Christian Nativity Scene as it appeared on the front lawn of the Albemarle County Office Building from the angles and distances at which these photographs were taken.

32. Defendants have made no expenditures of funds or use of personnel in the erection, maintenance of, or provision of electricity to the Christian Nativity Scene.

33. The attached December 2, 1987 minutes of the Albemarle County Board of Supervisors meeting are true and authentic copies of said minutes. [Minutes not reproduced in this Appendix]

34. The Albemarle-Charlottesville Jaycees are a private, nongovernmental civic organization composed of citizens of Charlottesville and Albemarle County, not connected with any religion or religious sect, as set out in their bylaws attached hereto.

35. The history of the Jaycees' Nativity Scene, and the Jaycees' purpose in seeking permission to place it on the lawn of the County Office Building, are as set out in the affidavit of its president attached hereto.

36. Shortly after the Nativity Scene was constructed and before this suit was filed, a sign approximately 18" by 6" was placed in front of the scene reading "Sponsored by Charlottesville Jaycees."

37. Shortly after this suit was filed a larger sign as shown on the photographs attached hereto dated 12/31/87 was placed in front of the scene.

38. Prior to the Jaycees' request, the front lawn of the County Office Building had been used by private groups for the following purposes:

(a) refreshment and souvenir booths during the Dogwood Festivals, with podium, for speakers and crowning of Dogwood Queen;

(b) a billboard showing the United Way "thermometer" during United Way funding campaigns;

(c) State Volunteer Firemens picnic;

(d) two Easter Sunrise services;

(e) several weddings;

(f) Municipal Band performances;

(g) First Night Virginia (New Year's Eve Celebration consisting of displays and entertainment)

(h) a civil rights demonstration consisting of several hundred demonstrators who sang, carried placards, and

gave speeches on the lawn and front steps of the building on October 1, 1987.

/s/ D. Brock Green
D. Brock Green
MacQueen, Rosenfield and Green
917 East Jefferson Street
Charlottesville, Virginia 22901
ACLU Cooperating Attorney
Counsel for Plaintiffs

/s/ George St. John
George St. John
Albemarle County Attorney
416 Park Street
Charlottesville, Virginia 22901
Counsel for Defendants County of Albemarle, Bain, Cooke, Bowie and Way

AFFIDAVIT

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE

This day personally appeared before me, Elizabeth B. Payne, a notary public in and for the city and state aforesaid, Jeanie Gilbert, President of the Charlottesville-Albemarle Jaycees, Incorporated and after being duly sworn, made oath as follows:

The Charlottesville-Albemarle Jaycees, Incorporated, is a private, nonsectarian, nongovernmental organization composed of residents of the City of Charlottesville and Albemarle County. (See attached copy of Article I and Article II of the By-Laws of the Charlottesville-Albemarle Jaycees, Incorporated.)

Since the late 1950's, the Charlottesville-Albemarle Jaycees have annually erected a nativity scene as an ongoing community service project. The Jaycees were continuing a community tradition which had originated in 1953 through the efforts of Charlottesville Jewish and Christian businessmen who, in that year, first placed the scene in Lee Park, a park owned by the City of Charlottesville. The Jaycees continued to erect the nativity scene in Lee Park until 1984, when the Charlottesville City Council refused to permit the organization to erect the Nativity Scene in its traditional location. Since 1985, the Jaycees had erected the nativity scene on property owned by the Martha Jefferson Hospital, but this property was paved by the hospital for parking in 1987. In searching for a site for the nativity scene in 1987, the project chairmen required a location that would be visible, accessible and offer a 110 volt socket for floodlights for night illumination. The corner of Preston Avenue and Ridge-McIntire met the visibility and accessibility requirements and the property was also equipped with an appropriate electrical connection. These practical considerations, and not the fact that the

location houses the Albemarle County Office Building, motivated the Chapter's request that it be able to erect the nativity scene on County property.

CHARLOTTESVILLE-ALBEMARLE JAYCEES, INCORPORATED

By: /s/ Jeanie Gilbert
Jeanie Gilbert, President

Sworn, subscribed and acknowledged before me this 22nd day of March, 1988 by Jeanie Gilbert, President of the Charlottesville-Albemarle Jaycees, Incorporated.

My commission expires: 4-10-89

/s/ Elizabeth B. Payne
Notary Public

BY-LAWS

THE CHARLOTTESVILLE - ALBEMARLE JAYCEES, INCORPORATED

(herein called the "Corporation")

ARTICLE I: PURPOSES

Section 1.01. *General Purposes.* The purpose of this Corporation shall be to develop leadership and to promote the welfare of the community and its citizens.

Section 1.02. *Political Affiliations.* This Corporation shall wholly abstain from any political affiliations or endorsements of candidates for public office.

ARTICLE II: MEMBERS

Section 2.01. *Qualifications.* Any person who is (i) a citizen of the United States of America, (ii) a resident of and/or employed in either the County of Albemarle or the City of Charlottesville, Virginia (iii) between the ages of 21 and 40 years, both inclusive, and (iv) a registered voter in the county or city of his permanent resident, if eligible under applicable laws, may be elected to membership of this Corporation as hereinafter provided. If a person is not eligible to be a registered voter under applicable laws, he shall still meet the qualifications for membership so long as he registers to vote within 90 days after becoming eligible. The President may designate at any time a special committee to make an annual check of the appropriate records to ensure that each member of this Corporation is in compliance with the voter registration requirements of this section.

Section 2.02. *Election to Membership.* Any person who meets the qualifications set forth in Section 2.01, completes and submits a membership application form and pays any initiation fee in such amount as may be determined by the Board of Directors may be elected to membership

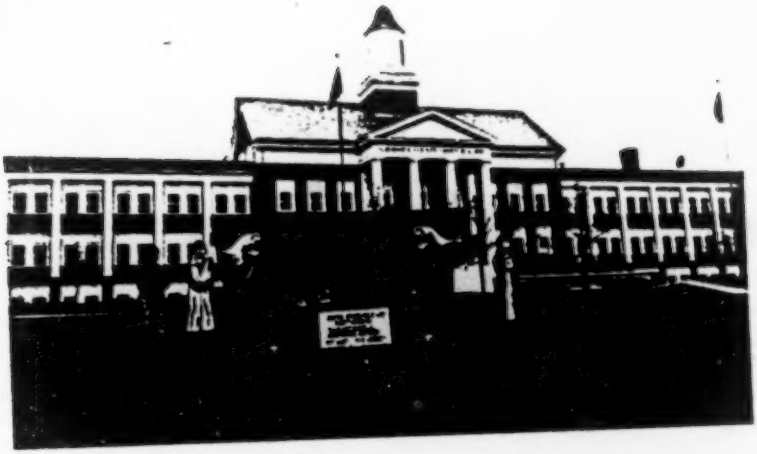
in this Corporation by a majority vote of the Board of Directors.

Section 2.03. *Waiver of Qualifications.* Any person between the ages of 21 and 40 years, both inclusive, not otherwise qualified for membership under Section 2.01, may be elected to membership to this Corporation by a two-thirds vote of membership.

Section 2.04. *Waiver of Age Limitation in Certain Cases.* (a) Any member who shall attain the age of 41 years after the first day of June of any year, may, at his option, continue as a member until the first day of June of the following year. (b) Any President of this Corporation, who serves as Chairman of the Board following his year as President, may remain a member until the completion of his term as Chairman of the Board, regardless of age.


A


A



APPENDIX G

COUNTY OF ALBEMARLE
Office of County Executive
401 McIntire Road
Charlottesville, Virginia 22901-4596
(804) 296-5841

MEMORANDUM

TO: George R. St. John, County Attorney

FROM: Ray B. Jones, Deputy County Executive

DATE: April 8, 1988

SUBJECT: Size of County Office Building and Lot

According to records in the Staff Services office, the County Office Building has a total of 132,350 square feet on four floors. As you know, the building is not shaped like a rectangle, but more like the letter "E". The area of the first floor is approximately 38,340 square feet. Attached is a site plan, showing base area of Phase I and II.

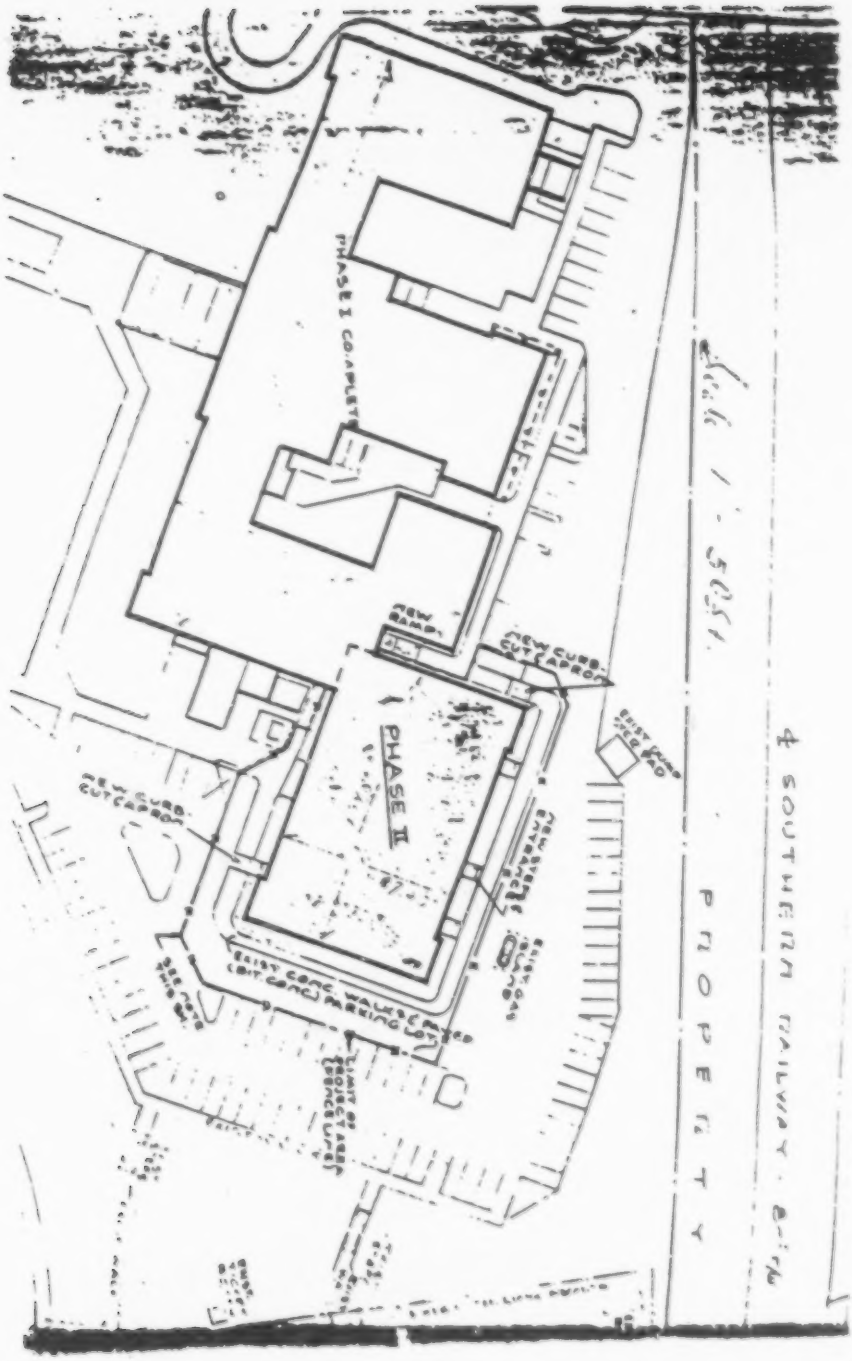
According to our inquiry with the City of Charlottesville Property Tax Office, the lot in which the County Office Building is located contains 14.625 acres.

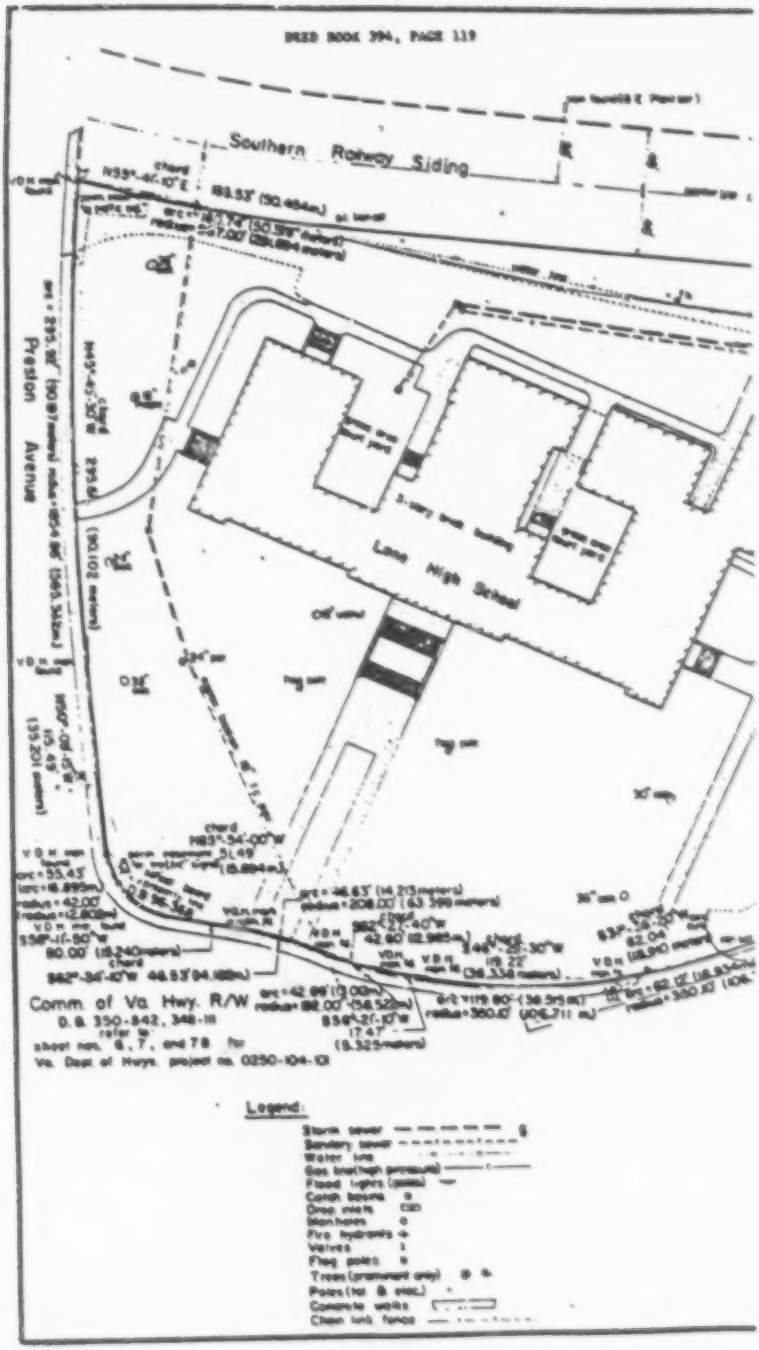
Hopefully, the above addresses your questions on April 7, 1988.

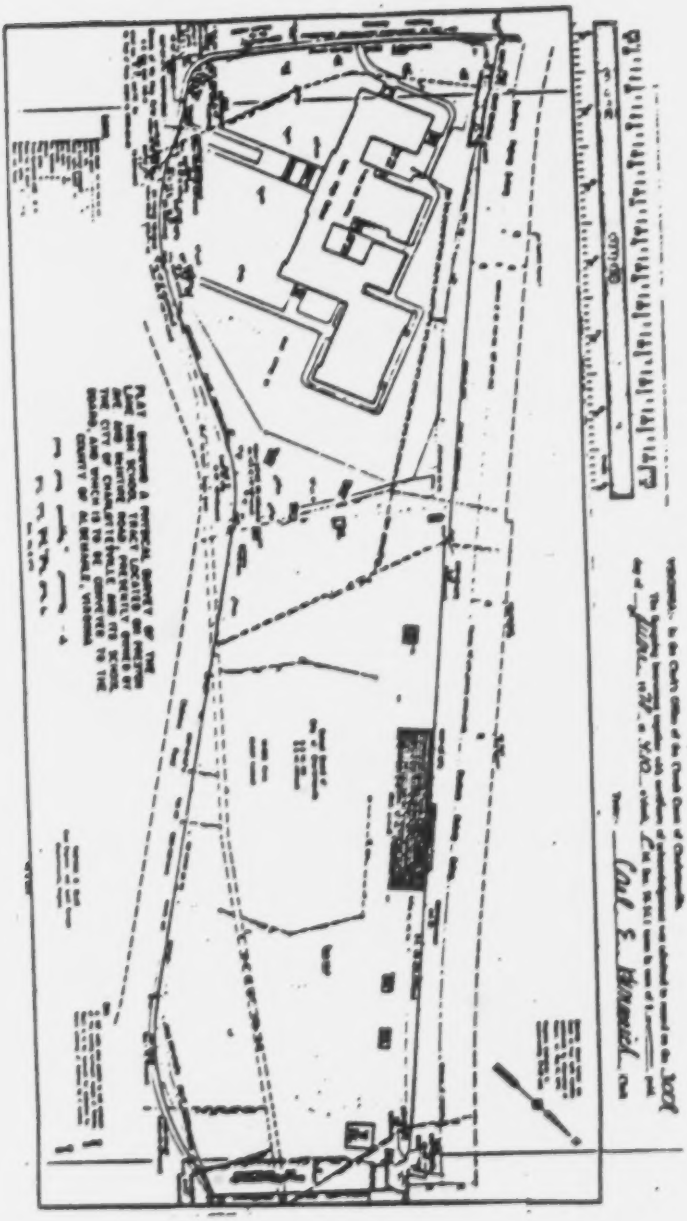
RBJ/mlm
22-47

Attachment

DEFENDANT'S EXHIBIT
#1
87-0068-C
6-24-88


PHASE I COMPLETE
PHASE II
PROPERTY


DEED BOOK 394, PAGE 119
Southern Railway Siding
Preston Avenue
Lane High School
Comm of Va. Hwy. R/W
D.B. 330-842, 348-111
refer to
sheet nos. 6, 7, and 78 for
Va. Dept of Hwys. project no. 0250-104-101
Legend:
Storm sewer
Sanitary sewer
Water line
Gas line(high pressure)
Flood lights (poles)
Catch basins
Drop inlets
Manholes
Fire hydrants
Valves
Flag poles
Trees (ornamental only)
Poles (tel. & elec.)
Concrete walks
Chain link fence



APPENDIX H

Deposition Testimony of County Executive, Guy Viar Agnor, Jr., taken at 9:00 A. M., March 9, 1988

[110] * * *

Q Was there such a policy in effect on December 2nd when the vote on the creche was taken, December 2, 1987?

A Yes.

Q Do you recall whether or not the policy, is there only one policy that you are aware of that governs private use of county facilities?

A Only one to my knowledge. I should maybe qualify, the school system and the school board has a policy for use of the school facilities that is complimentary to this one that you are speaking of, but this is the only one that I am aware of for general government buildings.

Q And, in fact, the one we are talking about for general government buildings was derived in part from the school system's policy, wasn't it?

A Yes, so they could compliment each other.

Q Do you know when that policy, the general government buildings "Facilities Use Policy", the one that I am going to be talking about when we talk about the "Facilities Use Policy, do you know about when that policy was enacted?

A Several months after we moved to the present [111] office building, I'd say probably January, February 1982, early 1982.

Q Do you know when originally enacted by the county board, was that policy intended to cover use of the lawn in front of the county office building as well?

A I would say it was. It was intended to cover county facilities. I suppose you have to get a definition of what facilities are, but it was intended to be used for county property.

Q Do you know whether the word lawn or any reference to that grassy and concrete area in front of the building was ever mentioned in the facilities use?

A I don't believe it is, not to my memory.

Q Can you tell me why you feel that that policy does cover and has always covered the lawn in front of the county office building?

A Because it's applicable to the county parks, the county buildings, the county grounds, including not just the lawn at the county office building but the athletic field that is down there, the parking lots. I just never considered it as anything other than facilities meaning property.

Q None of those areas you just mentioned are specifically mentioned in that county use facility are they?

A No, they are not.

[112] Q How do you say, on what basis do you say that it is applicable to all of those places? Is it simply because of the way the policy has been applied over the years, or is there something else that's happened that made that policy applicable to all the county facilities rather than the one just specifically referred in the policy?

A It has been applied to all facilities. It was originally generated by a request to use the auditorium in the county office building as a principal need for it, but when it was drafted and adopted my interpretation of it meant that it meant all county facilities, meaning property. Even though I don't believe it is that specific.

Q And, to your knowledge that's the way it has always been applied?

A Yes.

Q Do you know if this "Facilities Use Policy" was followed with the Jaycees' request to use the front lawn for their creche in December of 1987?

A Yes, to my knowledge they made the request. The only variation that I would, maybe your question is leading to, is that I did not make the decision by myself which the policy allows me to do, but I took it to the Board of Supervisors. It was addressed to them and I carried it to them.

Q Why did you do that for this request?

[113] A Well, first, like I said, the request was addressed to the Board through my office and secondly, because I knew of the controversy that city council had had with it. So, I did not choose for the Board of Supervisors to read in the news media a decision I made independently without conferring with them on the matter.

Q Is it fair to say you felt it might be a "hot potato"? You felt that the highest body of the government in the county ought to be ruling on it?

A I knew that city council ruled on it in the citys decision on it and I felt the county governing body should certainly be offered the opportunity to do the same in terms of it now being asked to be placed on county property.

Q As I read the "Facilities Use Policy" it doesn't mention the word supervisors, it doesn't contemplate that the Board would ever rule on a request for permission to use county facilities? Am I missing something, is that in there?

A No, that is not in there, it is an administrative policy that the Board adopted that I am supposed to administer.

Q Then can I interpret your message correctly that at least in that regard that you, or a designee of yours, did

not make the decision on whether to grant the [114] permission to this group, you gave it to the county to grant permission and that is not contemplated in the "Facilities Use Policy"?

A That's correct, I believe, if I understand your question. Neither I nor anyone on my staff made the decision. We asked the Board, we passed the request to the Board for their discussion and they made the decision. I didn't ask them to make the decision. I passed the request to them and in the process, of course, they made the decision. They certainly could have told me it was my responsibility to make that decision but that wasn't what I was seeking. I was seeing their guidance.

Q Do you recall in your tenure as county executive that the Board has ever made any other decisions on private use of county facilities?

A Not since the policy was adopted to my memory. There were other occasions earlier when there was no policy. I don't remember any since the adoption of this policy. I might add also, that in my administration responsibilities I frequently take matters to the Board that I want them to be aware of before my decisions or even ask for their guidance. It is not unusual as you would probably realize.

* * *

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U. S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Albemarle County, Virginia, Policy on "Community Use of County Facilities," adopted on February 10, 1982

A. *Generally*

The Board of Supervisors believes in the full and best possible utilization of the physical facilities belonging to the citizens of the county. To achieve this end, the use of county facilities for school and student-related activities, as well as by outside organizations and groups, shall be encouraged when these activities will not interfere with the routine business of the county.

Proper protection, safety and care of county property shall be primary considerations in the use of county facilities.

B. *Eligible Organizations*

The Board has classified various organizations and groups for the purposes of priority and the charging of fees.

1. *Classifications*

I. School affiliated or related groups.

II. Youth agencies, educational, recreational and cultural groups or organizations.

III. Political, civic, chartiable, social or veteran's groups and organizations.

IV. Profit making organizations, business or private groups.

V. Religious organizations.

2. *Membership*

The membership of any group or organization requesting the use of county facilities must be largely from the County of Albemarle. This restriction shall not exclude the use of certain facilities, as determined by the County Executive, by state and national organizations that have a local sponsoring division of such organization.

C. *Applications and Approval*

Applications must be sponsored by reputable and established clubs, societies or organizations that reasonably can be held responsible for the payment of charges, compensation for damages to property and for use of the property in reasonable conformity with the regulations on the application.

The Board authorizes the County Executive or his designee to approve all applications for the use of county facilities that meet the requirements of the Board, that comply with implementing regulations the County Executive deems necessary to protect county property and that do not conflict

with established business or commercial interests in the community. The County Executive shall design such application forms as are required. The completed and signed form shall be a binding agreement upon the applicant and the county.

D. *Fees*

The County Executive shall establish a minimum schedule of fees and may make additional adjustments in the fees. The minimum schedule and additional adjustments shall be based upon the classification of the group or organization, the facilities to be used, the size of the group, the objectives of the organization, the approximate cost to the county and the purpose for which the facility will be used.

In general, the following guides will apply:

Classifications	Fees
I	Regular meeting: no charge Fund raising: custodial charges
II	Regular meeting: custodial charge Fund raising: custodial charges rent of facilities
III and IV	Basic rental fee including custodial charges
V	Custodial charges

A full rental fee shall be charged to all classifications except I when county facilities are to be used for fund raising and/or when an admission charge is levied.

All fees must be paid in advance, and the sponsoring organization whose name appears on the application shall be held responsible for any and all damages to property and equipment.

E. *Protection of County Property*

An employee of the county shall be on duty on the property at times when the facilities are in use. No equipment

or furnishings may be used or moved without the consent of the employee in charge if such usage is not in conformity with the contracted agreement.

The sponsoring organization shall be responsible for crowd control measures, including the employment of police protection when required. Such control shall be arranged in advance when deemed necessary by the County Executive or his designee.

F. *Deposits*

A cash bond or deposit may be required at the discretion of the County Executive or his designee prior to use of the property.

User Classification	Fee	Deposit Required
I	None	None
II	Utility and custodial cost (Custodial cost based on overtime rate)	Appropriate to activity
III and IV	Utility and custodial cost plus $25.00 or 10% of gate (whichever is larger)	Appropriate to activity
V	Utility and custodial cost plus (dependent on activity)	Appropriate to activity

(3)

No. 89-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF ALBEMARLE, VIRGINIA,
Petitioner,

v.

WILLIAM S. SMITH, *et al.*,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

D. BROCK GREEN, ESQUIRE
(Counsel of Record)
917 E. Jefferson Street
Charlottesville, VA 22901
(804) 296-4138

Counsel for Respondents
ACLU Cooperating Attorney

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

22

QUESTION PRESENTED FOR REVIEW

Whether the lengthy display of a solitary, unattended Christian Nativity Scene on the public forum lawn of the County Office Building violates the Establishment Clause of the First Amendment of the United States Constitution?

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Chabad v. City of Pittsburgh, 89-2432 (W.D. Pa., December 20, 1989); No. 89-3793 (3rd Cir., December 26, 1989); No. A-476, ___ U.S. ___, 110 S.Ct. 708 (1989)	14,15
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Foremaster v. City of St. George, 822 F.2d 1485 (10th Cir. 1989)	14
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IN THE

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COUNTY OF ALBEMARLE, VIRGINIA,

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Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Except as otherwise explained below, the Respondents adopt the statement of the case of the Petitioner. The following discussion, in part, complies with Supreme Court Rule 15.1(A)'s requirement to bring to the Court's attention any ". . . perceived misstatements of fact . . ." in the Petition.

On December 2, 1987, the Charlottesville-Albemarle Jaycees made an oral presentation to the members of the Petitioner's Board of Supervisors in support of its application to use the front lawn of the Albe-

marle County Office Building as the location for its Christian Nativity Scene (hereinafter called creche). In explaining the legal status of the front lawn, the County Attorney, Counsel of Record for Petitioner in this case, explained to the supervisors that, by allowing the creche, they would be creating a public forum.[1] This is in stark contrast to Counsel for Petitioner now arguing before this Court that, ". . . the location of the private display was in an open public forum that had been used on numerous occassions in the past for social, commercial, religious, artistic and political expression and other privately sponsored events." Petitioner's Brief, p. 8.

The Albemarle County Office Building had been in this location for only six years prior to the display of this creche. Prior to 1981, the building been the home of Lane High School. There is no evidence, nor argument from either party, that the front lawn was a public forum prior to the County's occupancy of the building in 1981.

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[1] "I think his concern as to the precedent this will set for future decisions is really the only legal concern you have here. . . . To my knowledge that particular corner has not been used for a purpose like this before. And if we use it for this purpose now, then what you will have done is what the courts call 'dedicated as a public forum.' That's not the same as dedicating a road or anything. It just becomes a precedent. You have allowed that place to be used by members of the public for religious or other purposes, and therefore you couldn't exclude someone who wanted to have some other symbol like that. This is a symbol, and if somebody else wanted some kind of political symbol or religious symbol, or whatever symbol they want, you're going to have to find some distinction, some factual distinction, in order to tell the next people 'We're sorry, but you can't do this.' " Appendix to Respondent's District Court Memorandum of Law, p. A-10, 11.

Furthermore, in the six short years between 1981 and 1987, the front lawn had ". . . been used sporadically for occasional activities: a beauty pageant, a billboard for the United Way, two Easter Sunrise services, several assorted weddings, municipal band concerts, and a civil rights demonstration." Petitioner's Appendix, p. 22a. Hence the lawn had only been used for "religious" purposes on two occasions, those being Easter sunrise services, lasting only a couple of hours, and only sporadically on a few other occassions for events of varying lengths of time.

In its December 2, 1987 meeting, the Board of Supervisors approved the placement of the creche at the requested location. However, in contrast to Petitioner's statement that the County's approval was ". . . subject to . . . placement by the Jaycees of a disclaimer sign to eliminate any misunderstanding about County involvement," the Supervisors never required nor even discussed any disclaimer. Petitioner's Brief, p. 5; Appendix to Respondent's District Court Memorandum of Law, p. A-8 - A-13.

The creche remained at this location, one of the busiest intersections in Charlottesville, for a continuous period of five weeks, December 6, 1987 through January 10, 1988. It was continuously lit at night, exposing it to view 24 hours a day. It covered an area of approximately 500 square feet, contained holy figures approximately seven feet tall, a manger approximately nine feet tall, twelve feet deep, and twenty feet wide, and at the time of its erection, was not accompanied by any explanatory sign or disclaimer. Appendix to Respondent's District Court Memorandum of Law, p. 76. Immediately prior to,

during and subsequent to the display of the creche, there were no other symbols of the holiday season whatsoever, religious or otherwise, present on the lawn. Petitioner's Appendix, p. 92a - 93a. Finally, the creche sat directly in front of the Albemarle County Office Building, the seat of County government, directly beneath the sight line of the words "Albemarle County Office Building" and flanked on either side by the American flag and the flag of the Commonwealth of Virginia. Petitioner's Appendix, p. 92a - 93a.

The first sign placed in front of the creche after its erection stated "Sponsored by Charlottesville Jaycees" and was 18 inches by 6 inches in size. After this lawsuit was filed, a "larger sign" replaced the first sign. There is nothing in the record indicating the size of the second sign. Petitioner's Appendix, p. 94a. Because of their size, distance from the intersection, and fact they were to be read from moving vehicles, both signs were illegible to the majority of observers of the creche. Petitioner's Appendix, p. 46a, 47a, 53a, 59a.

SUMMARY OF ARGUMENT

The Court of Appeals and District Court correctly determined the display of the instant creche in the location, manner and for the duration involved violated the Establishment Clause of the First Amendment. *County of Allegheny* v. *ACLU*, 109 S. Ct. 3086 (1989). Their decisions correctly applied the analysis and rationale of *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to conclude that the least restrictive means to avoid an Establishment Clause conflict was to prohibit

the display of this creche from this location for this length of time.

There have been no decisions of this Court or any of the other circuits which conflict with the decision of the Court of Appeals in this case.

This case is not certworthy because of the recency of this Court's on-point decision in *Allegheny* and denial of certiorari in *Kaplan* v. *City of Burlington*, 891 F. 2d 1024 (2d. Cir. 1989), *Pet. for Cert. denied* No. 89-1625, June 10, 1990[2] , and because the result in each of this type of case turns exclusively on individual facts and therefore adjudication by this Court at this time would do nothing to establish helpful precedent for lower courts.

ARGUMENT IN SUPPORT OF THE DENIAL OF A WRIT OF CERTIORARI

I. The Fourth Circuit Court of Appeals decided this case directly in line, not in conflict with *Allegheny*, *Widmar* and the applicable decisions of other Circuit Courts.

The most recent decision of this Court bearing directly on the unconstitutionality of religious displays on public property occurred only last year in *Allegheny*. The Court held that the display of a creche in a nonsecular setting in the front hallway of the County Office Building violated the second prong of the test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971): the primary effect of its location, setting and duration constituted an unconstitutional governmental

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[2] *Kaplan*, to be referred to extensively throughout this brief, ruled unconstitutional the placement of privately-owned menorah in a public forum in a setting similar to the instant case.

endorsement of religion. In applying the precise rationale and analysis used by this Court in *Allegheny*, the Court of Appeals took note of this Court's admonition that the Establishment Clause is violated when a given governmental practice has the appearance or effect of endorsing religion. The Court of Appeals correctly found that the instant creche conveyed at least as strong a message of government endorsement as the *Allegheny* creche. Significant to the Court of Appeals was the instant creche's location on the otherwise unadorned front lawn of the Albemarle County Office Building without any other surrounding secular symbols or artifacts. The Court also noted the prominent wording identifying the building as the "Albemarle County Office Building" and the other strong indicia and aura of government. Hence, the Court of Appeals agreed with the District Court that ". . . the unmistakable message conveyed is one of government endorsement of religion—impermissible under the Establishment Clause of the Constitution." Petitioner's Appendix, p. 11a.

The Court of Appeals, as did the District Court, then discussed the precise facts to which the Petitioner argues those Courts gave short shrift: the instant creche is privately owned and was placed in a public forum. Both Courts correctly acknowledged that the starting point for determining whether the message of endorsement is constitutionally mitigated by its private ownership and placement in a public forum is this Court's decision in *Widmar*.[3] The Court

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[3] In *Widmar*, this Court decided that a state University which has an open access policy to its student activities rooms must apply that policy to religious groups as well or it may violate those groups' free speech and association rights.

laid out a method of analysis and resolution of this seeming conflict between the Establishment and speech clauses of the First Amendment, which analysis has been confirmed and reapplied by this Court, the Court of Appeals and District Court in this case, and many other courts in related cases: private speech activities from a public forum may only be restricted by reasonable time, place and manner restrictions or by narrowly tailored restrictions responding to a compelling state interest. This Court clearly recognized in *Widmar* and subsequent cases that the government's necessity to be free from violations of the Establishment Clause is such a compelling state interest. In applying this analysis to the instant facts, the Court of Appeals and the District Court correctly concluded they must restrict the Jaycees' right of symbolic speech in this case because of the overwhelming message of government endorsement the speech created.

Both Courts acknowledged the existence of the second sign in front of the creche, but agreed it was impotent in mitigating or removing the cloud of government endorsement of religion. The Court of Appeals stated:

> The relatively small size of the disclaimer, however, in relation to the whole of the display, mitigates its value. It remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion. In effect, such an aura defeats Albemarle County's attempt to argue for a remedial measure short of total removal of the creche. (Petitioner's Appendix, p. 11a.)

The Petitioner clearly overstates the effect and importance of the single small sign in the instant case. This Court has already recognized that such a disclaimer is of no use in overcoming such an overwhelming message of governmental endorsement.[4] In line with this Court and other Circuit Courts, the District Court found as a factual matter that this creche's overwhelming message of government endorsement was not mitigated by the sign:[5]

> In analyzing this creche under the effect prong of the Lemon test, one other feature merits mention. A series of disclaimer signs were erected around the creche, at first one quite inconspicuous and then a second disclaimer sign somewhat less inconspicuous. The presence of even this relatively larger disclaimer sign cannot undercut the endorsement that is apparent. The larger disclaimer sign is still rather small and not easily read. Drivers cannot easily read the disclaimer while passing the scene, the intersection is

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[4] "While no sign can disclaim an overwhelming message of endorsement, an 'explanatory plaque' may confirm that *in particular contexts*, the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Allegheny*, 109 S. Ct. at 3114 (emphasis added).

[5] See also, *Kaplan* at 1029, n. 5: "Even if this display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by this context would not be negated. City Hall is closely identified with this particular city park, as its very name and proximity to the seat of municipal authority suggest. In these circumstances, 'a disclaimer of the obvious is of no significant effect.' " *American Jewish Congress*, 827 F.2d. at 128 (citation omitted).

busy, and it is hardly possible to park or to stop and read the disclaimer with the care that would be necessary. Thus, the setting and the potential effect of disclaimers is quite different in this case than in *Allen* v. *Morton*, where that District of Columbia Circuit Court of Appeals identified the possibility of revised disclaimers as mitigating the threat to the establishment clause. 495 F.2d 65, 90-91 (D.C. Cir. 1973). In *Allen*, the display was within a park with ample pedestrian walkways and far more opportunity for those viewing the display to read and assimilate its intended message of dissociation. (footnote 17) Id. at 78-79.

17 This is not to suggest that, were there more pedestrian access to and pedestrian traffic past the creche on the front of defendants' lawn accompanied by signs which would attempt more effectively to disclaim government sponsorship of the display, then the display necessarily would have been able to avoid its difficulties under the effect prong of the Lemon test.

If the setting in this case [had] been more similar to that described in *Allen*, the result would be the same, for even a readily discernible disclaimer would hardly have been sufficient alone. A larger sign, by itself, would not necessarily begin to undercut the strong aura of government endorsement. As the Seventh Circuit Court of Appeals found in (*American Jewish Congress* v.) *City of Chicago*, '[T]he message of government endorse-

> ment generated by this display was too pervasive to be mitigated by the presence of disclaimers.' 827 F.2d (120, 7th Cir. 1987), at 128. (Parentheses added) Petitioner's Appendix, p. 46a-47a.
>
> This court finds that, given the message of endorsement which is communicated by the relationship between the trappings of government and the creche with its religious connotations, no less restrictive alternative than removal of the creche would curtail and impermissible message of government endorsement. The impotence of the disclaimers attached to the creche only reinforces this conclusion. Petitioner's Appendix, p. 53a.
>
> In the case before us, the vividness of the message of endorsement and the concomitant ineffectiveness of the disclaimers show in stark terms the power of symbolic speech. Not only were the disclaimer signs relatively small, but the message of endorsement conveyed by the symbolic embrace of the creche by government simply overwhelmed any attempt to disclaim. Petitioner's Appendix, p. 58a-59a.

Simply stated, the Court of Appeals and District Court correctly found that one cannot disclaim the obvious.

Petitioner similarly overstates the significance of the creche's erection in this public forum. Initially, the Court of Appeals and the District Court correctly held that the location of the creche in a public forum was but one of many factors to be considered in de-

termining whether a message of government endorsement of religion was conveyed:

> Essentially, Judge Michael found that whether the lawn is or is not a public forum is not dispositive. The critical gauge of any such content-related speech restriction is whether the overall context and nature of the restricted display conveys the impermissible message of governmental endorsement of religion. Petitioner's Appendix, p. 11a (footnote omitted).[6]

Recognizing the nature of the public forum in the instant case was one of extremely short duration, was one located in the lap of and surrounded by the trappings of County Government, and was one that only sporadically had been used during its short life for assembly activities, the Court of Appeals agreed with the District Court that the creche's location in this public forum did little to mitigate the message of government endorsement.[7]

In short, because of the Court of Appeals' correct application of the analytical framework of *Widmar*,

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[6] See also, *Kaplan*, 891 F. 2d at 1029: "The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." (citing *Widmar*).

[7] Even though the Court of Appeals agreed with the District Court that the lawn was technically a public forum, it stated, "The front lawn, though used for such events as weddings and concerts, does not have the traditional indicia of a free speech forum associated with a public park." Petitioner's Appendix, p. 11a.

Allegheny, and *Kaplan*, the "head to head clash"[8] between the Speech and Establishment clauses is largely illusory in this case. The Court of Appeals simply prohibited the display of this creche displayed in this manner from this particular location while allowing other sporadic, short-term religious uses of the property to continue unabated (Easter sunrise services).[9]

Respondents' exhaustive research has uncovered only three Circuit Court cases addressing these issues since this Court's decision in *Allegheny*. The Courts' analysis and holdings in each of these cases fully supports the holding of the Court of Appeals in this case or is clearly distinguishable on the facts.

In *ACLU* v. *Wilkinson*, 895 F.2d. 1098 (6th Cir. 1990) the Court found that, under the facts presented, the display of a stable from the grounds of the state capitol did not violate the Establishment Clause. The Court was careful to distinguish its facts from those found in *Kaplan* and those concerning the creche in *Allegheny*; it more closely analogized its facts to those

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[8] Petitioner's Brief, p. 15. There is no intractable clash between the two clauses here because neither principal is absolute. See *Bowen* v. *Kendrick*, 108 S. Ct. 2562 (1988) (incidental aid to religious organizations is permissible) compared to *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (reasonable time, place, and manner restrictions that may limit expression are valid) and *Widmar* (narrowly tailored restrictions on private speech which runs afoul of the Establishment Clause are required.)

[9] As the District Court stated, "This decision only involves what is at most a marginal or incremental geographic restriction on a certain type or display of symbolic speech. There is without question still an entire panoply of fora in the area for the type of religious speech which is at question in this case." Petitioner's Appendix, p. 60a.

involving the menorah in *Allegheny*. The crucial facts distinguishing *Wilkinson* from the instant case, and supporting a different result, albeit by a 2-1 decision, were as follows: The display was not a creche but was an empty rustic stable with no holy figures which itself could be used by any citizens or groups for any purposes, thereby significantly reducing its Christian religious message; the stable was surrounded by literally hundreds of other secular symbols of Christmas including lit Christmas trees, wreaths, lights, red ribbons around lamp posts and many holiday decorations on the capitol building itself; the land on which the stable sat had long been used and well-recognized as a public forum by the citizens of Kentucky; and, there was a large, meaningful, clear disclaimer sign announcing both the stable and the area surrounding it as a public forum and that the state in no way endorsed or supported any particular religion. Considering the total lack of any of the above facts in the instant case, it is clear the Fourth Circuit Court of Appeals correctly applied *Allegheny* and *Widmar* to reach the correct result in this case.

Most importantly, the Second Circuit's application of *Allegheny* to the facts before it in *Kaplan* is fully consistent with the Fourth Circuit's analysis and holding in the instant case. The Court of Appeals' decision in the instant case is even more strongly supported by the law than the Second Circuit's decision in *Kaplan* because the religious symbol there was a menorah, recognized by this Court in *Allegheny* as having less religious and more cultural significance than a creche and because the public forum involved in *Kaplan* was well-recognized as such.[10]

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[10] The third case was significantly less factually on point but

Petitioner argues the decision of the Court of Appeals conflicts directly with decisions from other circuits. It is sufficient to say that the cases cited by Petitioner (except for *Chabad* v. *City of Pittsburgh*, 110 S. Ct. 708 (1989), to be discussed in the next section of this brief) are all pre-*Allegheny* and pre-*Kaplan* and otherwise distinguishable on thefacts from the instant case.[11]

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nevertheless cited *Allegheny*. In *Foremaster* v. *City of St. George*, 822 F.2d 1485 (10th Cir. 1989), the Court considered whether the City's logo containing a picture of a Mormon church violated the Establishment Clause. Applying the rationale of this Court in *Allegheny*, the Court found that a genuine issue of material fact existed as to whether the primary effect of the logo conveyed a message of endorsement.

[11] *Allen* v. *Morton*, 495 F.2d. 65 (D.C. Cir. 1973) upheld the constitutionality of a creche displayed during the Pageant of Peace on the National Mall, a long-recognized public forum, when the creche was accompanied by several clearly stated disclaimer signs visible and legible by all who approached the creche. There were also other religious and non-religious displays on the Mall at the same time.

In *O'Hair* v. *Andrus*, 613 F.2d. 931 (D.C. Cir. 1979), the Circuit Court upheld the constitutionality of a short mass by the Pope on this same long-recognized public forum.

McCreary v. *Stone*, 739 F.2d. 716 (2nd Cir. 1984) *affirmed by an equally divided court, sub. nom. Board of Trustees of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985) was distinguished by the Second Circuit in *Kaplan*. The Court made clear that the location of the religious symbol in *McCreary*, a traffic circle owned by the city, was possessed of much less governmental aura than City Hall Park. The Court also felt this Court's opinion in *Allegheny* was a much clearer, doctrinally correct analysis of the issues than that previously used by the Second Circuit in *McCreary*.

II. There have been no cases decided by this Court since the decision of the Court of Appeals which support a grant of a writ of certiorari.

The Petitioner relies heavily upon Justice Brennan's Order vacating the stay of an injunction allowing *Chabad* to place its menorah outside Pittsburgh City Hall. *Chabad* v. *City of Pittsburgh*, 89-2432 (W.D. Pa., December 20, 1989); No. 89-3793 (3rd Cir., December 26, 1989); No. A-476, ___ U.S. ___, 110 S.Ct. 708 (1989). Again in its argument Petitioner leaves out significant facts and fails to recognize the standard of review utilized by Justice Brennan.

As Chabad itself argued, its menorah should be allowed because it was a part of a "combined holiday display."[12] Chabad also made an allegation, totally absent from the instant case, that the City's refusal to permit its menorah was in retaliation for Chabad's litigation.[13] Most importantly, there had been no decision on the merits in Chabad's latest case and Chabad's appeal put into issue only the District Court's grant of the Preliminary Injunction. Hence, the standard of review Justice Brennan applied was simply whether the Order of the District Court was an abuse of discretion. Petitioner's reliance on *Chabad* to support its request for the granting of certiorari is simply misplaced.

Petitioner also quotes dicta of this Court in *Westside Community Board of Education* v. *Mergens*,

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[12] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, p 14, n. 6 (expressly distinguishing *Kaplan* on its facts).

[13] Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, p.2, 4-8.

___ U.S. ___ , No. 88-1597, 58 U.S.L.W. 4720 (June 5, 1990). One of the issues in *Mergens* was whether the Equal Access Act was unconstitutional if it allowed equal access to public high school classrooms by a bible study group. In holding the act constitutional, this Court simply extended the holding in *Widmar* to high schools. This Court affirmed its prior legal analysis used in *Widmar* and followed by the Court of Appeals and District Court in the instant case. However, as the Court of Appeals and District court explained, the *Widmar* analysis when applied to the facts of the instant case mandates a different result from *Mergens*: In *Mergens*, the forum involved was a typical public forum designed and widely recognized for the free exchange of ideas and used for that purpose by many other groups. Furthermore, the bible study group's use of the facilities would be out of sight of the public, for a short duration and would involve "active" speech, much less capable of public misinterpretation than the "passive" symbolic speech in the instant case.[14]

Finally, and most importantly, this Court considered and denied the City of Burlington's petition for a writ of certiorari in *Kaplan* on June 11, 1990, approximately one and a half months ago. Of all the cases cited by Petitioner and Respondent, *Kaplan* is most factually and legally on point with the instant case. As the Circuit Court found and previous argument has shown, the facts of the instant case constitute at least as strong a violation of the

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[14] See Court of Appeals' opinion at Petitioner's Appendix, p. 13a and District Court's opinion at Petitioner's Appendix, p. 52a.

Establishment Clause as *Kaplan*, thereby mandating a denial of Petitioner's request for a writ of certiorari.

III. Petitioner's request for a writ of certiorari should be denied for the additional reasons of the recency of this Court's pronouncements in *Allegheny* and *Kaplan* and secondly that the fact specificity of each of these "religious symbol on public property" cases radically diminishes their precedential value.

This Court has considered all the issues involved in the instant case during the past year in *Allegheny* and *Kaplan*. Both of these cases fully support the analysis, rationale and holding of the Court of Appeals that the display of the creche in the instant case constituted a clear violation of the Establishment Clause unmitigated by its location with a disclaimer in a public forum. Because this Court has so recently considered all the precise issues involved in this case, Petitioner's request for a writ of certiorari should be denied. Additionally, whether or not a violation of the Establishment Clause is found in any of these cases depends solely on the specific facts before the Court. Hence, especially in light of the recency of *Allegheny* and *Kaplan*, any decision by this Court on the merits will provide little, if any, guidance and precedent to lower courts at this time.

CONCLUSION

The Fourth Circuit Court of Appeals correctly applied the analysis and rationale of *Widmar*, *Allegheny* and *Kaplan* to the instant facts. Its decision protects the compelling interest of the County to be free from violations of the Establishment Clause while recognizing that certain religious "speech" may still be constitutionally permissible from certain public prop-

erty. The decision of the Fourth Circuit Court of Appeals does not conflict with any decisions of this Court nor with any decisions of any other circuit courts.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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